FILE COPY

No. 269

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926

FORT SMITH LIGHT AND TRACTION COMPANY,
PLAINTIFF IN ERROR,

vs.

BOARD OF IMPROVEMENT OF PAVING DISTRICT
No. 16 OF THE CITY OF FORT SMITH, ARKANSAS
DEFENDANT IN ERROR

STATEMENT AND BRIEF OF THE PLAINTIFF IN ERROR

JOSEPH M. HILL,
HENRY L. FITZHUGH,
R. M. CAMPBELL,
Attorneys for Plaintiff in Error.

CALVERT-McBRIDE PRINTING CO., FT. SMITH, ARK.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926

FORT SMITH LIGHT AND TRACTION COMPANY,
PLAINTIFF IN ERROR

vs.

BOARD OF IMPROVEMENT OF PAVING DISTRICT NO. 16 OF THE CITY OF FORT SMITH, ARKANSAS
DEFENDANT IN ERROR

INDEX

CITATIONS

CITATIONS—Continued

No. 269

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926

FORT SMITH LIGHT AND TRACTION COMPANY,
PLAINTIFF IN ERROR,

vs.

BOARD OF IMPROVEMENT OF PAVING DISTRICT
No. 16 OF THE CITY OF FORT SMITH, ARKANSAS
DEFENDANT IN ERROR

STATEMENT

Prior to 1919, cities of the first class in Arkansas (and Fort Smith is one of them) had authority to grant exclusive privileges to street car companies for the use of the streets. Crawford & Moses' Digest, Section 7492, Appendix A. This statute was upheld in Lackey vs. Fayetteville Water Company. 80 Ark., 108. These municipalities were further empowered to authorize the construction of street railways. Crawford & Moses Digest, Section 7565, Appendix B.

Prior to 1919, cities only had the right to regulate the rates for water, gas and electricity. Kirby's Digest, Section 5445, Appendix C. Under this last statute, a municipal corporation had power to revise downward any unreasonable rate for water, gas or electricity established in a franchise, but courts could not grant relief from maximum rates fixed in franchises, even on proof of confiscation. Arkadelphia Light Company vs. Arkadelphia, 99 Ark., 178; Lonoke vs. Bransford, 141 Ark., 18. This was the state of the law in 1919.

This company operated a street car system and supplied gas and electricity in the cities of Fort Smith and Van Buren. While the city had a limited right to regulate the gas and electric rates, it had no jurisdiction over street car rates, and, on the other hand, the company had no right in court for relief against a street car rate fixed in a franchise, even if the rate was proved to be confiscatory.

In 1919 the General Assembly passed Act 571, which created a Corporation Commission and delegated to it the regulation of rates and all other regulatory power possessed by State over public utilities, and pertinent sections of it are set out in the Appendix.

Section 13 provides that no public utility shall be granted a franchise except on certificate of convenience and necessity. Appendix D.

Section 14 provides that all grants should be indeterminate. Appendix E.

Section 15 provides for surrender of franchises and taking an Indeterminate Permit in lieu thereof. Appendix F.

Section 16 provides that any public utility accepting or operating under an Indeterminate Permit shall, by its acceptance, be deemed to have consented to the future purchase by the municipality of its property actually used and useful for the convenience of the public. Appendix G.

Full authority was granted the Commission to regulate the rates to the public, either on their own motion or on application; and to supervise the issue of bonds; and provision was made for the purchase by municipalities of public utilities operating therein; and power was given the Commission to hear and award compensation and damages; and the Act provided for a court review of all the acts of the Commission. Details of these provisions are not considered pertinent herein and are not set out, but their existence is of importance.

Pursuant to the provision of Section 15, this company surrendered its franchise in the cities of Fort Smith and

Van Buren and applied for an Indeterminate Permit to operate in those cities a street railway system, an electric light and power plant and a natural and artificial gas distribution system. This Permit was issued by the Commission and is set out at Record pages 9 and 10.

In 1921 the General Assembly passed Act 124, which abolished the Corporation Commission and conferred part of the power vested in it on the Railroad Commission which was re-created, and part to the municipality in which the public utility operated; and it materially amended Act 571 of 1919. It expressly repealed Sections 13, 14 and 15, hereinbefore set out. Broadly speaking, it vested in the Railroad Commission authority to regulate public utilities not operating in a municipality, and vested in the municipality the regulation of utilities operating therein.

Regarding the status of corporations which surrendered franchises and took an Indeterminate Permit, this Act provided, Section 15, that such corporation might, within ninety days after its passage, reinstate its franchise, but unless the application for reinstatement was within said time, it should be deemed a waiver on the part of the corporation to insist upon the fulfillment of the franchise; and that all corporations electing not to reinstate their franchises shall be permitted to continue to operate under the same terms or conditions specified in said Indeterminate Permit, "but subject, however, to regulation in the same manner and to the same extent and with like force and effect as in the case of other and like utilities." Appendix H.

This company elected not to reinstate its franchises and continued to operate under its Indeterminate Permit.

The General Assembly of 1923 passed Act 680, which was approved March 26, 1923, which Act is the subject matter of this suit and is herewith set out in full:

"ACT NUMBER 680.

"AN ACT TO REQUIRE ALL PERSONS, FIRMS OR CORPORATIONS OPERATING A STREET RAILWAY

SYSTEM UNDER AN INDETERMINATE PERMIT TO PAVE BETWEEN IS RAILS AND TO THE END OF ITS TIES, AND FOR OTHER PURPOSES.

"BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF ARKANSAS:

"BE IT ENACTED BY THE PEOPLE OF THE STATE OF ARKANSAS:

"Section 1. It shall be the duty of every person, firm or corporation operating any street railway on, along, or across any street or avenue in any city of the first class in the State of Arkansas, under and by virtue of any indeterminate permit issued by the Arkansas Corporation Commission, to pave between its rails and to the end of its ties, whenever the portions of said streets or avenues adjacent to the portion of the street occupied by its ties and rails shall have been paved by the City, the County, or an Improvement District. Said space between the rails and to the end of its ties shall be paved by the person, firm, or corporation, operating under said indeterminate permit, with the same class and character of material used by said City, County or Improvement District in paving the other portion of said street or avenue adjacent thereto.

"Said work shall be done by the person, firm or corporation holding said indeterminate permit, in a good and workmanlike manner, and the pavement so laid by the person, firm or corporation holding said indeterminate permit shall be maintained by said person, firm or corporation in as good condition as the remainder of the pavement laid on said street or avenue.

"In case the person, firm or corporation operating said street railway under such indeterminate permit shall deem it advisable to use a different character of material for paving that portion of any street or avenue between its rails and to the end of its ties than that used on the remainder of said street, it may present a written petition to the City Council or Commission of said City asking permission to use some other character of material, and the City Council or Commission is authorized to grant

said petition either by ordinance or resolution, in case, in the judgment of said City Commission or Council, the material set forth in said petition is of equal grade and durability to that used on the balance of said street or avenue.

"Section 2. The tracks of any such street railway and the paving provided for in Section 1 hereof shall be laid and maintained to the grade established by said City.

"Section 3. The Circuit Court of the County in which said City is located is given jurisdiction to enforce compliance of the provisions of Section 1 hereof by mandamus upon the complaint of said City.

"Section 4. Whenever the City, the County, or an Improvement District shall have adopted final plans for the paving of any street or avenue occupied by such a railway track, and shall have finally determined upon the material to be used, it may cause to be served upon said person, firm or corporation operating said street railway, a notice, in writing, stating the character of material to be used upon the balance of said street and directing said person, firm or corporation to proceed with the work of paving between the rails to the end of its ties. In case said person, firm or corporation shall fail to start said paving within thirty days, or to complete the same within a reasonable time, then said City, County or Improvement District, as the case may be, may cause the tracks of said street railway to be brought to grade and may construct the pavement between said rails and to the end of its ties.

"The amount expended by said City, County, or Improvement District in paving said space between the rails and to the end of the ties, together with ten per cent interest on the amount of said expenditure from the date thereof, may be recovered by it from the person, firm or corporation holding said indeterminate permit, in an ordinary action at law.

The remedies provided for in this section are cumulative and are in addition to the remedy of mandamus provided for in the preceding section.

"Section 5. The term 'pavement' as used in this Act shall include a proper foundation and all excavation, drainage, and other work necessary to properly pave said space between the rails and to the end of the ties. Provided the provisions of this Act shall not apply to Miller county, Arkansas.

"Section 6. This Act, being necessary for the immediate preservation of the public health and safety, shall take effect and be in force from and after its passage.

"Approved March 26, 1923."

This Act was introduced in the General Assembly by Mr. Galloway, Representative of Sebastian County, in which county Fort Smith is situated, in the exact language in which it was finally passed, except the proviso, to-wit: "provided the provisions of this Act shall not apply to Miller County, Arkansas", was inserted as an amendment by the House, and passed by the House in its amended form, and then passed by the Senate. Miller county is the county in which the city of Texarkana is situated. There was operating in the city of Texarkana (also a city of the first class), a street car company under an Indeterminate Permit.

The franchise surrendered by the company in 1919 was a fifty-year franchise, running from November 20, 1905 (R. p. 29).

This franchise gave an exclusive privilege to use many streets, including Garrison Avenue. Garrison Avenue, where eleven of the thirteen blocks of paving involved herein is situated, is the main business thoroughfare of the city. It carries the principal part of the traffic of the town and it is practically the only business street of the town; it is solidly built up with business houses on both sides, and all the street cars converge on it and nearly all cars traverse it (R. p. 38).

This company was given the right to carry mail, express and baggage and the right to transfer, assign, consolidate or convey its rights to any person or corporation, and it was provided that its stock might be trans-

ferred to non-residents without affecting its rights. It was given the right to propel its cars by electric motors, overhead or underground wires, or storage batteries, or compressed air, or such other means as may hereafter be found preferable, except animal or steam power. Its rate of fare was fixed at five cents for a continuous trip, with one-half fare for school children; and children under four, and firemen and policemen in uniform to be carried free; and transfers were to be furnished on demand on a continuous trip over other lines of the company.

There were provisions that the tracks were to be maintained in good order and the company required to maintain the grades conformable to the grades established by the city, and the franchise contained this clause:

"Provided, that said Street Railway Company shall, when the balance of the street is being paved, at its own expense pave between the rails and tracks of said Street Railway, on all streets where tracks are now laid or may hereafter be laid, with the same material and in like manner and condition as may be authorized by ordinance, resolutions or law, and the said Street Railway Company shall at all times provide safe and suitable crossings at all cross streets for wagons and other vehicles, and that said crossing street railway and pavings shall at all times be kept in safe condition and in good repair; and the said Street Railway Company shall keep its tracks in good repair between the rails." (R. pp. 27-30.)

In 1912 a Paving District known as No. 7 paved Garrison Avenue; and part of the expense of it was borne by the city of Fort Smith. Under the existing franchise quoted above, the company was compelled to pave between its tracks, and it complied with this by constructing a brick pavement between the tracks and paid for the wooden pavement on each side of the brick pavement constructed by it, to the end of the ties. The improvement district and city constructed the rest of the pavement on Garrison Avenue of creosoted wooden blocks. Its construction and condition will be referred to later.

The cost of paving that part of Garrison Avenue paved

by this company in 1912, including the concrete base which was used in the paving, was, in round numbers, $50,000.00. This sum included $3,935.58 paid to the Improvement District in 1921 for the wood block pavement from the outside of the rails to the end of the ties (R. p. 30).

The history of the present Paving District No. 16 is as follows: The first petition was presented to the City Commission on April 1, 1922. An ordinance creating the District was passed April 12, 1922. The second petition, showing a majority in value of the owners of real estate in favor of the improvement, was presented to the City Commission June 13, 1922, and a hearing set for June 29, 1922. Publication was duly given on this hearing. On the hearing it was found that a majority in value of the real estate owners of the District had signed for the improvement and the District was declared organized. The Board qualified and the engineer filed his report of estimated cost. On August 10, 1922, the Board determined the estimated cost, inclusive of interest, to be $270,000.00. A Board of Assessors was appointed and qualified and filed their report on February 2, 1923, showing total assessed benefits of $277,747.00. Notice of filing of the assessments was duly published, and an ordinance was passed on February 16, 1923, which levied the assessments as determined by the assessors. On February 27, 1923, the Board sold $150,000.00 worth of the bonds to the highest bidder, at 98.28 cents on the dollar. The actual paving construction cost paid by the District was $165,853.04, of which $11,272.97 represented the construction cost, exclusive of engineering and supervision, of the paving laid within the rails and to the end of the ties of the street car tracks within the limits of said District (R. pp. 30 and 31).

In connection with the organization of Paving District No. 16 the history of Act 680 is pertinent. Mr. Galloway was the Representative and Mr. Thompson was the Senator from Sebastian county, in which Fort Smith is situated. Mr. Galloway introduced House Bill 786 on February 22, 1923; it was read first and second times and re-

ferred to the Committee on Public Service Corporations. This committee on March 1st reported in favor of the passage of House Bill 786, with an amendment, which amendment was added to Section 5: "provided the provisions of this Act shall not apply to Miller county, Arkansas." The Bill introduced by Mr. Galloway as House Bill 786 was exactly the same as Act 680, except this amendment was added to the Bill in the House. Mr. Galloway stated the House treated House Bill 786 as a general bill; that it was usually customary in the House to pass a local bill whenever it only affected a county and the member from the county favored it, as a matter of legislative courtesy. Mr. Thompson took charge of the Galloway Bill when it went to the Senate. He understood that in its present shape it only affected Sebastian county, and he told the Senate it was a local bill and he wanted the Senate to pass it for him, and it was passed. It was a rule of senatorial courtesy that all Senators vote for a local bill on the request of the Senator from the locality affected, and a general bill was considered on its merits. The bill as amended passed the House on March 3, 1923, and on March 5th was transmitted to the Senate and was read the first and second times and made a special order for March 7, 1923, and on said date passed the Senate (R. pp. 23 and 24).

It will be noted that the bill was introduced six days after the assessments were levied for the full amount of the cost of the construction of the improvement, including interest, and including cost for that part of the improvement now sought to be recovered from this company. It had not passed the House when the bonds were sold on February 27. The Act was approved by the Governor March 26, 1923 (R. p. 24).

After the construction of the pavement was finished, the Improvement District brought suit against this company under the provisions of Act 680 to recover of it the amount the Improvement District had expended in constructing the pavement between the rails and to the ends of the ties.

The complaint alleged its creation as an Improvement

District, a quasi-public corporation, and that it was created as such for the purpose of paving certain streets and avenues in the city of Fort Smith; that the streets it was to pave were Garrison Avenue from Second Street to its eastern terminus and one block just off Garrison on North Third and one block just off Garrison Avenue on North Fifth Street.

It alleged that the city of Fort Smith was a city of the first class and that this company was a corporation duly organized and existing under the laws of Arkansas, with its principal place of business in Fort Smith, and it owned and operated a street railway in such city, part of which was on Garrison Avenue and on the other two blocks within this District.

It alleged that prior to 1919 this company operated its street railway under a franchise granted by the city of Fort Smith, authorizing it to operate on said streets, and that said franchise required it to pave between its rails with the same character of paving that the balance of the street was paved with, and to maintain the pavement between the rails and two feet on each side thereof.

That in 1919, this company, pursuant to authority granted in Section 15 of Act 571 of 1919, surrendered its franchise and in pursuance of said Act received an Indeterminate Permit, and has since said time and is now operating its street railway in the city of Fort Smith by virtue of said Indeterminate Permit.

The complaint alleges that prior to April 5, 1923, the Board of Improvement of Paving District No. 16 adopted final plans for the paving of streets and avenues in said District, including the streets and avenues specially mentioned, which were at that time, and still are, occupied by the tracks of the street railway company, and that said Board had finally determined upon the material to be used on the streets and avenues of said District, and on that date served a notice upon this company in the form prescribed by Section 4 of said Act 680, and the defendant failed to do the work mentioned in the notice, and that the District had done the work at a cost, ex-

clusive of engineering, for $11,272.97, and $507.22 for engineering appertaining to this particular work done between the rails and the ends of the ties, and prayed judgment for said sums with interest at the rate of 10 per cent from the date of expenditure thereof (R. pp. 1-4).

The Answer contained five paragraphs. The first admitted the organization of Paving District No. 16 as stated, and that the defendant was a corporation as therein stated, owned and operated a street railway system in the city of Fort Smith. It alleged it had twenty-six miles of street railway in the city, including the lines mentioned in the complaint, which constituted about two miles, including the double track on Garrison Avenue. It admitted that prior to August 15, 1919, it operated in said city under franchises granted by said city, which franchises, among other things, required this company to pave between the rails with the same character of pavement the balance of the street was paved with.

It set out the ordinances containing the franchises heretofore referred to, and alleged that said franchises constituted a contract between the city of Fort Smith and this company which was existing, and the only contract existing, between the city and this company on August 15, 1919.

It then set out the only provision of the franchise relating to street paving which was in Ordinance No. 453, which has been copied in this Statement.

It then set out certain obligations which the city had imposed by contract, which it could not otherwise impose, to-wit:

(a) The aforesaid obligation to pave between the rails when the street was paved.

(b) That the rate of charge should be five cents per passenger, and requiring transfer privileges from one line to another, and that school children should pay half fare, and firemen and policemen in uniform to be carried free.

That in addition thereto there were certain regulatory provisions, some of which the city had a right to impose,

the others resting in accepted provisions of the ordinance.

Then it set out valuable privileges granted to this company in the franchises, as follows, to-wit:

(A) The exclusive right to certain streets, among others Garrison Avenue, and that the franchise was a 50-year franchise extending from November 20, 1905; and that the ordinance granted this company franchises on various other streets which had not been occupied, and some of which have not as yet been occupied, but which the company had a right to occupy on August 15, 1919, which was a valuable right at that time.

(B) The ordinance granted this company the right to carry mail, express and baggage, which was a valuable right.

(C) The ordinance granted the defendant, its successors and assigns, the right to convey its rights and privileges under said ordinance, and to consolidate with other companies and to assign its stock to non-residents, which rights were existing on August 15, 1919, and were valuable rights.

That the General Assembly of 1919 passed Act 571, by Section 15 thereof authorized public utilities operating under franchises to surrender the same in the manner therein set out; and upon compliance therewith the Corporation Commission should issue to such public utility an Indeterminate Permit, thereby authorizing the rescission of all existing contracts in the form of franchises between municipalities and public utilities, and in lieu thereof granting rights and obligations as set forth in said Act; and the company receiving an Indeterminate Permit thereunder should be freed of all prior contractual obligations and divested of all its contractual rights under franchises between it and the municipalities.

That, pursuant to the Act, the defendant surrendered its franchises and received an Indeterminate Permit, which is set out in full at Record pages 9 to 10.

The Answer alleged the obligations heretofore set out requiring the defendant to pave between the rails when

the streets were paved ceased and determined and no other further obligation rested upon the defendant to pave between its rails or otherwise.

It then alleged that under Section 16 of said Act 571 the municipality acquired a right to purchase any plant operated under an Indeterminate Permit under the terms prescribed in said Act, which right was a valuable right which the State secured in behalf of the municipality when this defendant surrendered its franchises.

It then set out the substance of Act 124 of 1921, heretofore set out in this Statement and in the Appendix.

It alleged the defendant continued to operate under an Indeterminate Permit under Act 571 of 1919 as continued in force under Act 124 of 1921.

It then alleged that Act 680 of 1923 sought to place upon companies operating under Indeterminate Permits different obligations than companies operating under franchises, contrary to the provisions of Act 571 of 1919 and contrary to Act 124 of 1921.

The defendant alleged the right of regulation and the right to have burdens imposed upon it are limited by the terms of said Act 571 and Act 124, and that the attempt to add other and different burdens upon the defendant because it is operating under an Indeterminate Permit than other companies operating under franchises is an impairment of the obligation of a contract, contrary to Article I, Section 10, of the Constitution of the United States, and contrary to Article II, Section 17, of the Constitution of Arkansas.

The defendant further alleged said Act 571 of 1919 and the Indeterminate Permit granted under and pursuant to its terms, and Act 124 of 1921, constituted a contract between the State and this defendant, as the company elected to continue to operate under the Indeterminate Permit pursuant to the authority of said Act; and that under and pursuant to the authority of neither of said Acts had the State or the municipality any right or power to compel this defendant, when a street occupied by it

was paved by the city, county or improvement district, to pave between its rails and to the end of the ties, and that said Act 680 of 1923, approved March 26, 1923, is an attempt on the part of the State, through said Act, to impair the obligation of the contract, and is void as in conflict with Article I, Section 10, of the Constitution of the United States, and Article II, Section 17, of the Constitution of Arkansas, and the defendant especially sets up it relies upon Article I, Section 10, of the Constitution of the United States, and the rights, privileges and immunities therein granted to it to be protected against the impairment of the contract, and alleges that for reasons herein stated said Act 680 and all proceedings had thereunder by the plaintiff herein, are void so far as the same seek to impose the obligation sued for upon this defendant. It is therefore prayed to be dismissed with its costs and for further relief.

The second paragraph alleged Act 680, under which the plaintiff is seeking to recover, was an arbitrary act of the General Assembly, and is void as denying the defendant equal protection of the law and depriving it of property without due process, for the following reasons:

It then set up the facts heretofore stated regarding the paving in 1912 of Garrison Avenue by the City and an Improvement District jointly, and the defendant's franchise obligation to pave between its rails, which it did with brick pavement, and the City and Improvement District paved with creosoted blocks of wood, and an agreement was reached between the City and the Improvement District on one side and this defendant on the other by which the defendant, instead of paving with wooden blocks should pave between its tracks and a short space on either side with brick; that the paving done by the City and Improvement District was inadequate and in a few years fell into bad repair and got into such condition that at the end of ten years it had to be entirely discarded and a new pavement constructed, and for that purpose the plaintiff District was formed.

That at the time the plaintiff District was formed, the pavement constructed by the defendant was in good usable

condition and entirely adequate to stand the traffic imposed upon it and would have been adequate for a number of years.

That the paving constructed by the defendant would have been in better condition than it was, although in fairly good condition, had it not been for the poor paving done by the City and the Improvement District, which, from time to time, squeezed the brick pavement constructed by the defendant, causing it much damage, and putting the defendant to much expense from time to time to repair it.

And that, owing to the bad condition of the pavement done by the City and the Improvement District, much more traffic used the brick pavement than otherwise would have been done, thereby placing a greater burden upon it than was intended to be placed, yet at the time of the creation of the plaintiff District there was no necessity for repaving that part of the street which had been paved by the defendant.

That the plaintiff District tried to get the defendant to pave between its tracks, which it declined to do because it was then under no legal obligation to do so, and because it had been to a great expense and had done the paving required of it and there was no necessity for repaving that part of the street which had been constructed by it, or, if a necessity did exist for that repaving, it was on account of the poor paving done by the City and the Improvement District and the damage which that pavement had done to the brick pavement constructed by the defendant. That thereupon the plaintiff District was organized and in that organization obtained the consent of a majority of the owners of real property in the District and levied assessments to pay for the paving of Garrison Avenue and the parts of the streets named in the complaint, which said assessment was sufficient to pay for the entire paving, including the cost of that part which is now sought to be imposed upon this defendant.

That after said District was organized and the assessments levied as aforesaid, the plaintiff caused a bill to

be drawn seeking to place upon the defendant the obligation of which it had been relieved in the surrender of its franchise, and in fact the obligation sought to be imposed through said bill was greater than had been imposed in the franchise which has heretofore been set out.

The Answer then alleged that under the Constitution of Arkansas, the General Assembly is prohibited from passing any local or special bill unless notice shall have been published in the locality where the matter or thing to be affected may be situated, which notice shall be at least thirty days prior to the introduction into the General Assembly of the bill for such an Act.

The bill was drawn as a general Act applicable to all companies operating under Indeterminate Permits and in such form was introduced into the General Assembly without any prior notice of its introduction being given.

That at the time there were only two companies operating a street railway in cities of the first class in Arkansas under Indeterminate Permits. This company, which was operating in Fort Smith and Van Buren, and a company operating in Texarkana, Miller county.

That the defendant was operating in Van Buren under a franchise similar in all respects to those in the city of Fort Smith heretofore referred to, which had been surrendered and an Indeterminate Permit in lieu thereof had been issued.

That at that time there were street railways operated in ten cities and towns in Arkansas whose names are set out.

That all of said companies, except this defendant and the one operating in Texarkana, were operating under franchises granted by the various municipalities in which they operated, and the franchises therein determined the obligations of the companies in regard to the paving; some of them required paving to be done substantially as was required by the ordinances of the cities of Fort Smith and Van Buren, while others placed no such obligation upon the street car companies, and still others

placed different obligations on the street car companies.

That the bill as introduced was an exact copy of Act 680, except a provision in Section 5 thereof exempting Miller county; and on its face appeared as a general Act applicable to all persons, firms or corporations operating any street railway on any street or avenue in any city of the first class under and by virtue of an Indeterminate Permit issued by the Arkansas Corporation Commission.

After it was introduced, it was amended to exclude Miller county from its provisions, and in such form passed both houses.

There was no other company operating in cities of the first class under an Indeterminate Permit and there could be no such permits issued in the future, and thus said bill became a special bill applying only to this defendant company, and as such was passed by the General Assembly, and was passed within a few days after it was thus amended, and less than thirty days after it became a local and special bill by said amendment.

It was then alleged that, for the reasons aforesaid, said Act was void as conflicting with the Constitution of Arkansas.

The defendant further alleged that such singling out of this defendant as the only company out of eight companies operating street railways in the state to bear the burdens therein sought to be imposed upon it was a denial to this company of equal protection of the law and arbitrary exercise of the legislative power, and amounted to taking of the defendant's property without due process of law, contrary to the Fourteenth Amendment to the Constitution of the United States, which the defendant herein sets up and relies upon as a defense against the proceedings under said Act 680 of 1923.

Wherefore it prayed that complaint be dismissed, and for other relief.

The third paragraph set up that the claim of plaintiff could not be maintained, for the following reasons, to-wit:

That the plaintiff was organized under the laws of Arkansas providing for the organization in cities and towns of improvement districts to construct public improvements with the consent of the majority in value of the owners of real property adjoining the locality to be affected.

That pursuant to the authority vested in it under the law it levied benefit assessments in said district to pay for the public improvement to be constructed, including that part now sought to be imposed upon this defendant, prior to the passage of said Act 680.

That the ascertainment of benefits is based on the enhanced value of the real estate situated in an improvement district, and the funds to construct said improvements were raised by said benefit assessments. That the defendant owned no real estate in said district, its property consisting of rails, ties, poles and wires constituting a street railway system, all of which is personal property and as such is not liable under the Constitution of Arkansas to pay for a local improvement constructed by an improvement district.

That said Act 680 is an effort on the part of the General Assembly to enforce an assessment on personal property, and as such is void.

That if said Act is not as above stated, then it must be construed as an effort on the part of the General Assembly to require the defendant to pay for the privilege of operating its street car system on the streets within said district, and the General Assembly cannot, under the Constitution of Arkansas, levy such privilege tax.

That if said Act be construed as an exercise of the taxing power of the State delegated to the plaintiff, then the same is void as conflicting with Article XVI, Section 5, requiring property to be taxed according to value and that value to be ascertained in such a manner as the General Assembly shall direct, making it uniform and equal throughout the State, and further, forbidding one species of property upon which a tax may be collected to be taxed higher than another species of equal value.

That the effort through said Act 680 to require the defendant to pay for the paving therein mentioned, the costs of which is sued upon herein, is an attempt to indirectly levy an assessment to that amount against this defendant to become a credit when collected in favor of the owners of real property in said district, upon whose property a lien existed before the passage of said Act to pay for said improvement and as such is beyond the power of the General Assembly and is void.

The defendant further alleges that the plaintiff Improvement District is not vested under the law, and cannot be vested under the Constitution of Arkansas, with the power of regulating public utilities operating within its limits and as an attempt to exercise the power of regulating the same is void.

Wherefore, having fully answered, the defendant prays to be discharged and for further relief.

The fourth paragraph alleges that upon the facts set out in paragraph two, which it prays to be taken as a part of this paragraph, that the effect of said Act 680 and the proceedings thereunder is to take the property of the defendant to pay for a public improvement without just compensation, contrary to the Fourteenth Amendment to the Constitution of the United States and contrary to similar provisions in the Constitution of Arkansas, and the defendant sets up and relies upon said Fourteenth Amendment and said sections of the Constitution of Arkansas as a defense against said Act and the proceedings thereunder.

Wherefore the defendant prayed that the complaint be dismissed and it be discharged, and for further relief.

The fifth paragraph set up that the earnings of the defendant from its street car operation is less than two per cent upon the value of its property used in street car service, using the taxable valuation of the same, and that the imposition upon it of the amount herein sued for would be a deprivation of its property without due process of law, contrary to the Fourteenth Amendment, which the

defendant sets up and relies upon in defense of the proceeding under said Act 680.

Wherefore the defendant prayed that complaint be dismissed and it be discharged, and for further relief (R. pp. 5-18).

In addition to the facts hereinbefore stated, which were established upon the trial, the following additional material facts were proved: That the following are the names of the companies and the cities in which street railway companies are operating in Arkansas: Arkansas Central Power Company, Little Rock; Central Light & Power Company, Walnut Ridge and Hoxie; Fort Smith Light & Traction Company, Fort Smith and Van Buren; Hot Springs Street Railway Company, Hot Springs; Inter City Terminal Railway Company, North Little Rock; Pine Bluff Company, Pine Bluff; Southwestern Gas & Electric Company, Texarkana; West Helena Consolidated Company, Helena.

The company operating in Little Rock operates 27.04 miles, and serves a population of 70,000. This Company is not operating under an Indeterminate Permit, but under a franchise granted by the city of Little Rock. This franchise requires the company to build and maintain between its rails and two feet on each side thereof a pavement of like character and material as that laid in the balance of the street. Little Rock is a city of the first class.

North Little Rock is a city of the first class and the company there has five miles of street railway and serves a population of 18,000, and is operating under a franchise. The company is required in conjunction with the city to improve and keep in repair that part of the street occupied by its tracks and for 18 inches on either side, but it is not required to do paving when the streets are paved by an improvement district and not by the city. All the streets in North Little Rock have been paved by improvement districts and the districts have paid for all the paving done on streets occupied by street car lines, including that between the rails and 18 inches out-

side thereof. The company has paid for no paving whatever.

Hot Springs is a city of the first class and the company operates 13.64 miles, and serves a population of 15,000 people. The company operates under a franchise, not an Indeterminate Permit, and the franchise requires the company to keep and maintain the space between the tracks and rails and one foot outside thereof, paved in good order and condition at the same time and in like manner of paving laid on the streets on which its tracks shall be laid.

Texarkana is a city of the first class. The company is there operating under an Indeterminate Permit and has mileage of 5.14 miles in Texarkana, Arkansas, and serves a population of 11,000. It also operates in the city of Texarkana, Texas, 6.32 miles, and serves a population of 15,000. There is no obligation resting upon the company by contract or otherwise to pave between the tracks in Texarkana, Arkansas. The city of Texarkana is situated partly in Miller County, Arkansas, and partly in the State of Texas.

At the time of the recent paving projects in the city of Texarkana, the company came to an understanding with the city, as a result of which, the company paved between the rails and to the end of the ties with gravel, the surface of the rails being maintained at approximately the elevation of the crown of the street. This understanding was reached after an investigation of the financial operations of the street railway system was made, and it was shown that the earnings of the company would not justify the installation of an expensive type of pavement in the space occupied by the street railway tracks and ties.

The city of Pine Bluff is a city of the first class and the company operates there 13 miles and serves a population of 25,000. The company is operating under a franchise, not an Indeterminate Permit. The company is not required to do any paving when the streets are paved on which its tracks are laid and it has never done so; all

the paving has been done by improvement district. (R. P. 31-33.)

The population served by this defendant company is about 40,000. (P. 38) and it has 26 miles of track in the city of Fort Smith (R. P. 5.)

It was stipulated that there were only two companies in Arkansas operating street railways operating under Indeterminate Permits, to-wit: Fort Smith Light & Traction Company and the company operating at Texarkana, in Miller County, Arkansas (R. P. 33.)

The only disputed matter was as to the necessity of repaving that part of Garrison Avenue which had been paved by the company in 1912, and whether the paving done by the Paving District left that part of the street in better shape than it was before the construction of this repaving.

The testimony concerning these disputed facts is found on pages 33 to 39 of the Record. In substance, it was as follows: The defendant introduced the testimony of three engineers tending to prove that if there had been about $1,600.00 spent on repairing the brick pavement which was constructed by the defendant in 1912 on Garrison Avenue, that the condition of said pavement would then have been better than the relaid pavement as constructed by the plaintiff district and for the cost of which this suit is brought.

On the other hand the plaintiff district introduced testimony of three engineers to the effect that the repairing of the condition of the brick paving on Garrison Avenue would have cost five or six thousand dollars (and one of them more than that) and when repaired it would not have been as good as the pavement which has been constructed by the plaintiff district, but on the contrary would have been a patched up job and would not have been fit to be a part of a new pavement.

The plaintiff also introduced testimony as to the condition of the two blocks off Garrison Avenue on North Third and North Fifth streets to the effect that the brick

pavement between the rails and to the end of the ties was badly worn and rough, and on the balance of the street the bricks were broken up and there was practically no pavement there.

These engineers went into some detail explaining why in their opinion the brick pavement installed by the defendant on Garrison Avenue in 1912 was not fit to be merely repaired and used as part of the new pavement. The engineers for the district set up in detail the cost of the work for which this suit is brought. It shows that all of the expense was on Garrison Avenue except one block on North Fifth Street at an expense of $789.96, and one block on North Third Street at an expense of $676.61 (R. P. 37.)

The defendant then proved by the plaintiff engineers on cross examination the following facts, which were undisputed. That in 1912 the defendant company paved with brick between its rails on Garrison Avenue and it was first class pavement throughout. It was standard up-to-date pavement at that time. Such a pavement without any disturbance from street car traffic would have a life of 15 to 20 years, and if properly maintained and with proper replacements, might have lasted 25 years. That the wooden blocks put down by Paving District No. 7 and the city began to squeeze the brick pavement shortly after it was constructed, and this pressure had the effect of derailing cars and breaking the axles of cars which used the railway tracks. This condition was a constant expense to the company and has now been eliminated by the plaintiff in paving the entire street with brick.

This Paving District and the city obtained a very poor job in 1912 for the wooden block pavement. The errors were in the specifications, and in the engineering and in the class of wooden block pavement. The specifications were inadequate and the sand filler between the blocks allowed the water to percolate. Wooden block pavement is a standard pavement if properly put down and properly constructed. If it had been properly put down and properly constructed, probably there would have been no

necessity for repaving in 1923 the brick pavement between the rails of the street car tracks.

In recent years after the wooden block pavement became so bad, most of the traffic on Garrison Avenue used the brick pavement put down by the defendant company. It was that part of the street in most general use by the public prior to the repaving in 1923. If the balance of the street had been in as good condition as the brick pavement put down by the defendant company in 1912, there probably would have been no repaving of the entire street in 1923. The pavement between the rails on Garrison Avenue as originally put down by this company in 1912 was a good job and first class paving, but there were objectionable features, as it was built with a crown somewhat higher than suited automobile traffic, but it was a serviceable pavement, and was fairly serviceable pavement when Paving District No. 16 started its work, but needed thorough repairs; most of these repairs needed was due to the swelling or heaving of these wooden blocks and part was due to the working out of the joints of the rails.

The paving other than the brick pavement done by this company on Garrison Avenue in 1912 was a bad job. It was done by Improvement District No. 7 and was a wood block pavement. It is a fact that the brick pavement done by the company in 1912 was in better condition in 1923 when it was taken up and relaid than the brick pavements in the city on other streets generally speaking, and there were about 50 miles of brick pavement on other streets in the city at that time. The brick pavement between the rails on Garrison Avenue was in fair usable condition when it was repaired in 1923, although Garrison Avenue outside of it was in horrible shape. Between the tracks was so much better than the other part of the street, which was wood block, that the traffic went upon the brick pavement between the tracks (R. P. 37-39.)

There was undisputed testimony that the valuation of this company's street car property taken at its assessed

value for taxation, and multiplying the same by two, on the theory that property is assessed at 50%, the basis upon which property is theoretically assessed, but in fact it is assessed less than upon said basis, and taking the gross receipts and expenses for the year 1923, it was making a return, after allowing 4.25% for depreciation, of 1.1719% on its value thus arrived at. Its earnings over and above operating expenses were $69,570.48; depreciation at 4.25% being $57,647.68 which left a balance for interest charges and profit of $11,922.80 (R. P. 33.)

The trial in the Circuit Court resulted in a judgment for the plaintiff District, said judgment following in the main the allegations of the complaint.

The Court held that Act 680 of the General Assembly of 1923 was valid. The Court further held that the expenditure made by the plaintiff was justified and necessary under the facts. That the condition of the pavement between the rails and the end of the ties of the tracks of the defendant on the said three streets was such that it was necessary and proper for the plaintiff to do said work and to expend said sum of money (R. P. 18-21).

The defendant pursuant to the local practice filed a motion for a new trial, which is in practice an assignment of errors, wherein all the matters relied upon in the answer and the evidence were set up as grounds for a new trial (R. P. 21-22.)

Motion for a new trial was overruled and the defendant at the time saved its separate and several exceptions and prayed an appeal to the Supreme Court, which was granted (R. P. 21.)

The Supreme Court affirmed the judgment and rendered judgment anew against the defendant and the surety upon its bond (R. P. 40.)

The opinion of the Supreme Court, written by Mr. Justice Humphreys is found on pages 41 to 45 and will be discussed in the argument.

The Chief Justice of the Supreme Court of Arkansas granted a Writ of Error to this Court (R. P. 45.)

The Writ of Error was duly issued and served and the case is here upon the Assignment of Errors which is as follows:

ASSIGNMENT OF ERRORS

NOW comes the Fort Smith Light and Traction Company, petitioner herein, the appellant in this Court, wherein a judgment was rendered against it in the Supreme Court of Arkansas on the 19th day of October, 1925, and which became final on the over-ruling of the petition for rehearing on November 13th, 1925, and says that in the record aforesaid there is manifest error, and in connection with its petition for writ of error states that the errors therein which it intends to rely on at the hearing are as follows, to-wit:

First: The Supreme Court of Arkansas erred in holding and deciding that Act 680 of the General Assembly of 1923, approved March 26, 1923, (Printed Acts, page 373) "Does not offend against the clause of the Constitution inhibiting discrimination between parties similarly situated," therein and thereby holding that said Act was not a denial to this petitioner of equal protection of the law, and that it was not an arbitrary exercise of the legislative powers, and amounted to taking of this petitioner's property without due process of law, contrary to the Fourteenth Amendment to the Constitution of the United States, which was specifically set up and relied upon in the second count of this petitioner's answer wherein it was alleged that said Act was void as offending the provisions of said Fourteenth Amendment.

Second: The Supreme Court of Arkansas erred in holding and deciding that Act 680 of the General Assembly of 1923 approved March 26, 1923, did not impair the obligation of a contract existing between the State and this petitioner through and under the operation of Act 571 of the General Assembly of 1919 authorizing this petitioner to surrender its franchises and receive and operate

its public utility business under an Indeterminate Permit, and also impaired the obligation of a contract existing between the State and this petitioner under and pursuant to Act 124 of the General Assembly of 1921, authorizing this petitioner to have its franchises re-instated or continue to operate under an Indeterminate Permit subject to regulations therein provided, which said Acts, and each of them, authorized a contract which was made by the acceptance of its terms by this petitioner, and which said contract was immune from violation under Section 10 of Article I of the Constitution of the United States, which Section and Article were specially set up and relied upon by this petitioner in the first count of its answer as ground for declaring said Act void.

Third: The Supreme Court of Arkansas erred in hold ing and deciding that said Act 680 of the General Assembly of 1923, was valid as an exercise of the power of the State to alter, revoke or annul any charter of incorporation whenever it may be injurious to the citizens of the State in such a manner, however that no injustice should be done to the corporators for the following reasons, to-wit:

(a) That said Act so construed amounts to taking of the petitioner's property to pay for public improvements without just compensation, contrary to the due process clause of the Fourteenth Amendment to the Constitution of the United States, which was specially set up and relied upon in such regard in the fourth count of the petitioner's answer as rendering said Act void.

(b) That said Act did not purport to be an amendment of the petitioner's charter and being declared by the Court a local act, could not operate as an amendment to the charter of a corporation without violating Sections 2 and 6 of Article XII of the Constitution of Arkansas and the decision of the Supreme Court of Arkansas in sustaining the same was a discrimination against this petitioner, thereby denying it the equal protection of the law, which was set out and relied upon in the petitioner's answer as ground for holding said Act void as against the

Fourteenth Amendment to the Constitution of the United States.

(c) That said Act so construed amounted to the deprivation of petitioner's property without due process of law, specially set up and relied upon in the fifth count of petitioner's answer rendering said Act void.

Fourth: The Supreme Court of Arkansas erred in not holding said Act 680 of the General Assembly of 1923 "The result of arbitrary or wholly unreasonable legislative action" and thereby void under the Fourteenth Amendment to the Constitution of the United States.

Fifth: The Supreme Court of Arkansas erred in not holding Act 680 of the General Assembly of 1923 as an arbitrary, oppressive, partial and unequal exercise of the legislative power, and if it was an attempted exercise of the police power, would be void as such because contrary to the due process clause of the Fourteenth Amendment to the Constitution of the United States.

Sixth: The decision of the Supreme Court of Arkansas in sustaining Act 680 of the General Assembly of 1923, on the ground of it being an amendment of the charter of the petitioner constitutes an evasion of the petitioner's constitutional rights set up in its answer in that said Act did not purport to be, and was not intended as an amendment of charters which under the Constitution of Arkansas can only be amended by a general Act, not a special one, and the Court in so sustaining it does so in the guise of the construction of the local constitution and the construction of a local act, when in fact the imposition provided for in said Act against the petitioner amounts to the taking of private property for public use without just compensation and taking of petitioner's property without due process of law, contrary to the Fourteenth Amendment to the Constitution of the United States, and as an impairment of the petitioner's contractual rights, contrary to Section 10 of Article I of the Constitution of the United States, which constitutional provisions are specially set up and relied upon in the petitioner's answer.

Seventh: The Court erred in not holding said Act 680 of the General Assembly of 1923 to be void as an attempt by the Legislature to make a retroactive payment upon special assessments theretofore levied against real estate to pay for the public improvement of Paving District No. 16 of the City of Fort Smith, Arkansas, thereby taking petitioner's property for public use without compensation, contrary to the Fourteenth Amendment to the Constitution of the United States.

ARGUMENT

IMPAIRMENT OF THE OBLIGATION OF THE CONTRACT

The franchises of this company embedded in the ordinances quoted in the Record constituted a contract not subject to impairment by the State.

> Hot Springs Electric Light Co., vs. Hot Springs, 70 Ark. 300.
>
> Lackey vs. Fayetteville Water Company, 80 Ark. 108.
>
> Pocahontas vs. Central Power & Light Company, 152 Ark. 276.
>
> Vicksburg vs. Vicksburg Water Company, 206 U. S. 496.

The opinion in this case does not dispute this proposition but expressly states that "appellant operated its street railway system under charters from the cities of Fort Smith and Van Buren, which were of a contractual nature." (R. P. 43.) (Evidently the Court intended to say franchises where it stated charters, as the charter of the corporation was isued under general law and these franchises were in the form of city ordinances.)

The State and the corporation enjoying these franchises had a right by mutual consent to rescind their contractual obligations, and municipalities with whom they were made had no right to object to mutual rescission on the ground that it was an impairment of the obliga-

tion of the contract, because the municipality was acting as agent of the State in making such contracts.

> Camden vs. Arkansas Light & Power Company, 105 Ark. 205.
>
> City of Worcester vs. Worcester Consolidated Street Railway Co., 196 U. S. 539.

As seen from the Statement herein, in 1919, this company was under obligation, through a contract with the city as an agent of the State, delegated to make such contract, to charge a maximum fare of five cents and to pave all streets occupied by its tracks between the rails with the same character of paving that the rest of the street was paved with. Upon the other hand it had valuable rights in that contract consisting, among other things, of an exclusive franchise running for thirty-six years for street car operation on Garrison Avenue, the principal street of the city, and on other streets, and with the privilege of carrying mail, express and baggage, and to consolidate with other companies and other rights.

The State made it, through said Act 571, and other companies similarly situated, a proposition, to-wit: Surrender your franchises and you will be absolved from the burdens therein and freed of the rights given therein and you will be regulated only under the police power of the State, and as a condition of this surrender, you must consent to sell your property to the municipality upon terms dictated by the State, and you will be protected from undue competition by a provision that no Permits will be granted in opposition to yours except upon a certificate of convenience and necessity.

This company then had an election to give up its contractual rights and to be freed of its contractual burdens upon these conditions, or to retain its contractual rights and burdens. This company elected to accept the State's proposition and did so, and was thereby relieved of its obligation to pave the streets between its tracks and other burdens, and gave up its exclusive rights and other valuable privileges, and it agreed that it would submit itself

solely to the police regulation of the State and consented to the purchase of its property by the municipality under the terms as set forth in said Act.

Indiana had passed a similar Act to Act 571 of 1919 of Arkansas, and it thus described the situation of this company in this State at this time:

> "The state was a party to the franchise agreement which the City of Greensburg made with appellant, acting for the state under delegated authority. Later the state, acting directly through its Legislature in making the proposal and through its Public Service Commission, on which it has conferred express authority in the premises, entered into a contract with appellant by the terms of which such franchise agreement was abrogated and rescinded in toto as to both parties. 'The extinguishment of the obligatory features of the old franchise as to one side, by necessary inference, operated to extinguish such features as to the other.' Calumet Service Co. vs. Chilton, 148 Wis., 334, 356; 135 N. W., 131, 140."
>
> Greensburg Water Co., vs. Lewis, 128 N. E. Rep., 103.

The State in dealing with its public utilities did not stop with the Act of 1919. This Act proved unsatisfactory to the State; and in 1921, the State radically changed it. It abolished the Corporation Commission with its regulatory powers and re-created the Railroad Commission and divided the power of regulation between it and the municipalities by giving the Railroad Commission the regulatory power over utilities not operating in cities, and to cities the regulatory power over utilities operating within them.

In view of these changes it said in effect to utilities who had surrendered their franchises, that if they would within ninety days surrender their Indeterminate Permits, then they may receive back their franchises with all their burdens and all their rights; but if they did not surrender their Indeterminate Permits within ninety days

they "shall be permitted to continue to operate under the terms or conditions specified in said indeterminate permit, but subject however to regulation in the same manner and to the same extent and with like force and effect as in the case of other and like utilities." See Appendix H.

This company again had an election. It could either take back its franchise or continue to operate under its Indeterminate Permit with the promise from the State that should it continue to hold its Indeterminate Permit, it would be regulated in the same manner and to the same extent and with like force and effect as in the case of other and like utilities. This company elected to continue to operate under its Indeterminate Permit with this promise from the State as to the State's future regulation of it.

The next Legislature, 1923, in plain violation of this promise, enacted Act 680 the subject matter of this suit. This Act regulated this company not only differently from other companies similarly situated, but differently from all other companies operating under franchises. The Bill for the Act was itself a plain violation of the promise of the State as it proposed to regulate all public utilities operating under Indeterminate Permits in cities of the first class differently from public utilities operating under franchises in cities of the first class; but to make the discrimination more pronounced and to break the promise of the State more effectually, the Bill was changed from a general act seeking to regulate street car companies operating under Indeterminate Permits differently from those operating under franchises, into a local act regulating this one company operating under an Indeterminate Permit differently from another company operating under an Indeterminate Permit, and differently from other companies operating under franchises.

In the Indiana case heretofore cited, the Court said of a similar situation:

> "By the italicized part of the Act quoted, the state attempted to violate the obligations of a con-

tract made with appellant, by the force of which the franchise contract had been abrogated in all its terms as to both parties. The Act attempts to revivify and re-establish some of the terms of the abrogated contract which were burdensome on appellant without its consent. That part of the Act, if enforced, would clearly impair the obligations of contracts, and for the reason stated it must be held to be void as in conflict with the sections of the Constitution heretofore cited."

Greensburg Water Co., vs. Lewis 128 N. E. 103.

In Oklahoma, a street car company accepted an ordinance in which it assumed the burden to pave six and two-thirds feet for each track which it placed in a street, and when double tracks were placed, it was to pave the space between the tracks.

Subsequently the Legislature passed an Act authorizing, or requiring, cities to impose upon companies operating therein to pave an additional six and one-half inches on either side of the track. It is pertinent to say here that the original franchise (R. P. 28) only required paving between the rails and tracks while this Act 680 is seeking to re-impose that burden added to it, by requiring paving between the rails and to the end of the ties (R. P. 24).

The Oklahoma Court said:

"Neither the Legislature nor the city of Enid reserved the power generally or specifically in the franchise in question to modify by adding additional burdens, or to abrogate the contract, and it was not within the power of the Legislature or either the city of Enid to impair the obligation of such contract in the manner attempted in this case. If the city of Enid could require the railway company to pave 26 inches in addition to the amount agreed to be paved, contrary to its consent, and in violation of its contract, then it could require said railway company to pave 13 feet, should the public good require it; or, if the contract can be violated in this respect,

it can in any other respect, and it will be seen that this is clearly in violation of the provisions of the Federal Constitution."

Enid City Ry. Co., vs. City of Enid, 144 Pacific Reporter 617.

In line with these cases and in support of their principles is Superior Light & Power Co., vs. City of Superior, 263, U. S., 125. This case will be discussed in another chapter of this brief.

It is respectfully submitted that there was a contract between the State of Arkansas and this company under which it obtained its Indeterminate Permit, and again when it retained its Indeterminate Permit, which could not be impaired by Act 680 of 1923 without violating Section 10 of Article I of the Constitution of the United States which was expressly set up and relied upon in the lower courts as a defense against the proceedings under said Act.

Whether said Act operated as an amendment to the charter of this company, relieving it of the impairment of this obligation of the contract, will be hereinafter discussed separately.

THE ACT NOT WITHIN THE POLICE POWER

It is not questioned that the State has not, and cannot, barter away the police power, and within that comprehensive term, is intended not only legislation for the protection of public health, morals and the well-being of society, but the enforcement of public duties resting upon public utilities in the proper performance of their functions in serving the public. There are many things within the competency of the State when it exercises the power fairly and reasonably, and not arbitrarily, to compel a public service corporation to do, or not to do, in the performance of its public function, even where such doing, or not doing, may entail loss, even confiscation. These recent cases illustrate the exercise of such power:

Fort Smith Light & Traction Co., vs. Bourland,

267 U. S., 330.

Western & Atlantic Ry. Co., vs. Georgia Public Service Commission, 267 U. S., 493.

Chicago & N. W. Ry. Co., vs. Ochs, 249 U. S., 416.

Pacific Gas & Electric Co., vs. Police Court of Sacramento, 251 U. S., 22.

Norfolk & Western Ry. Co., vs. Public Service Commission of W. Va., 265 U. S. 70.

People vs. Public Service Commission, decided Nov. 23, 1925, 70 Law. Ed. 92.

But it is contended that the right, even if fairly and reasonably exercised, to require a street car company operating an electric line in the street to pave the part of the street over which its lines run, is not within the police power, but its exercise when validly done must rest upon some other power.

Before discussing this question broadly, it may be useful to see the status of such companies under the laws of Arkansas.

In Fort Smith Light & Traction Co., vs. McDonough, 119 Ark., 254, the Supreme Court of Arkansas had before it a question regarding this particular company and these particular streets as to whether it was subject to improvement district taxes.

The Court held that the tracks of a street railway company laid along the streets of a city do not constitute real estate; that the property of such a company operating such a line through the streets of a city is personal property, and that under the Constitution and laws of Arkansas, that only real estate is subject to taxation for the payment for construction of local improvements. The same ruling was earlier made by the Court in the case of an improvement district created in Little Rock for the purpose of paving certain streets, which was created with the same power and right and under the same authority that Paving District No. 16 was created in Fort Smith. Lenon vs. Brodie, 81 Ark., 208.

It may also be useful to see the status and powers of improvement districts under the laws of Arkansas.

In Snetzer vs. Gregg, 129 Ark., 542, the Court had before it a statute creating an improvement district which provided for the assessment of personal property as well as real estate to raise funds with which to pay for the construction and maintenance of a levee to be constructed and maintained by the improvement district.

The Court reviewed fully the power of the State to create an improvement district and to levy taxes upon personal property to pay for the improvement and referred to the foregoing decision in Fort Smith Light & Traction Co. vs. McDonough, 119 Ark., 158, which is quoted from to the effect that personal property is not subject to taxation for such a purpose, and that the assessments must be confined to real estate benefited by the proposed improvement. The Court admitted that such a statement was *dictum* in that case, but approved it as a correct statement of law on the subject and adopted it, and stated: "Assessments for local benefits must be confined to real estate receiving peculiar benefits from the improvement to be constructed and maintained, and must be limited to those benefits, and personal property can not be taxed for that purpose."

In Whaley vs. Northern Road Improvement District, 152 Ark., 573, the Court had before it a case attacking the validity of a special statute imposing a privilege tax upon the use of automobiles and motor trucks by residents of an improvement district, which was a road improvement district.

The Court held that authority can not be conferred upon a local improvement district to levy a privilege tax for the payment of construction and maintenance of the improvement. The Court said it was in no sense a property tax, but a tax on the privilege of using the roads in the district. If it were a property tax, it would fall within the condemnation declared by the Court in Snetzer vs. Gregg, 129 Ark., 542, where the Court held

that personal property could not be taxed to pay the cost of a local improvement.

The Court further held that the theory upon which local improvements are authorized to be constructed and paid for out of local taxation is that the real property affected is benefited and the benefits received constitute the only justification of the special taxation for local improvements.

It further held that personal property, in the very nature of things, can not be taxed because that class of property cannot be benefited by the improvement.

It further held that the benefits to the real estate are the only justification for taxation of that class of property, and that such taxation is the only method of raising funds for the construction of the improvement; that taxes cannot be levied for privileges or on other classes of property for that purpose.

The Court further held there may be contributions out of public funds to the cost of construction of local improvements, but there can be no direct taxation either of property or privileges for such purpose other than by taxation upon the benefits accruing to real property from the improvement.

In this particular instance, the tax sought to be imposed was by direct legislation, such as this Act 680 at bar, and not under delegated authority, but the Court said that when the power is thus expressed, it must be general in its application so as to be uniform as a state tax, or it must be confined to one or more of the subordinate political agencies of the state so as to conform to the Constitution in the delegation of the taxing power; and that the taxing power can not be delegated to such an agency as a local improvement district, as it is only a governmental agency created for the purpose of constructing and maintaining a local improvement.

Thus it is seen that under the laws of Arkansas, street railway property is not subject to assessment for paving improvements on the streets the company may occupy;

that a privilege tax cannot be levied for the use of highways for automobiles and motor vehicles in improvement districts because such privilege tax would not be uniform as required by the Constitution, and because the improvement district is incapable of having other sources of revenue to pay for the improvement than the benefits assessed on the real estate in the district, except such donations as may be made from public funds raised under the taxing power by counties or municipalities.

In Connecticut, it was held that it was competent for the state to divide the cost of paving the street between the street car company and the abutting property owners under the police power. Fair Haven & Westville R. R. Co. vs. the City of New Haven, 75 Conn., 442. Plainly, such a decision could not be rendered in Arkansas in favor of an improvement district in the light of these decisions construing the powers of these districts and the character of the property of the company and the inability of an improvement district having other sources of revenue than benefit assessments and donations from funds raised by taxation. Moreover, in Arkansas the police power cannot be delegated to an improvement district. It may be delegated to municipalities and other subordinate political agencies capable of exercising it. 12 Corpus Juris 910-911.

In North Carolina, the Legislature, through a municipality, may impose an assessment for local improvements, such as paving, upon the property and franchises of a street railway company on a given street. Under this statute, street railways are classed as abutting owners and the power to impose this burden upon them "is referred to the sovereign power of taxation." Durham Public Service Co., vs. Durham, 109 S. E. Reporter, 40.

This case was affirmed in 261 U. S., 149.

It is seen that this case does not sustain the police power as the source of such an imposition on a street railway, but, on the contrary, places it squarely upon the power of taxation, which, as seen from the decisions

heretofore referred to, cannot be done under that power in Arkansas.

In the state of Washington, it is held, as in Arkansas, that street railway property cannot be assessed for local improvements under statutes which provide that real estate in the improvement district specially benefitted by the improvement shall be assessed therefor. A case arose there where a municipality, which had full regulatory power under the police power, attempted to lay a paving burden upon a street car company in addition to the burden laid under franchise contract between the municipality and the company. The Court held that there could be no doubt but that a municipality could require a street railway company to keep its tracks in reasonably safe condition under the police power, but that is very different from requiring a street railway company occupying streets under a definite franchise contract to place additional burdens upon it. The Court reviewed fully the authorities on the subject. State vs. Olympia Light & Power Co., 158 Pac. Rep., 85.

In Missouri, the police power of the state over the streets of the city was vested in the municipality, and the municipality sought through an ordinance to require paving to be done by a street car company operating in the streets, but the Supreme Court held that the city could not under the pretense of exercising its police power, shift the duty delegated to it by its charter of paving the streets, if the public good required it to be done and charging the cost to adjacent property owners, from their shoulders on to the street railway company. State ex rel vs. Corrigan Street Railway Co., 85 Mo., 263.

This subject is so exhaustively and conclusively disposed of in an opinion by the late Mr. Justice Mahlon Pitney while a member of the Court of Errors and Appeals of New Jersey, that we quote from his opinion at length. It is the case of Fielders vs. New Jersey Street Ry. Co., 68 N. J. L., 343; s. c. 59 L. R. A., 455.

The Legislature of New Jersey established a board of street and water commissioners who became vested

with the powers formerly vested in the common council, including the general control over the streets and with the express power to pass ordinances to regulate and control the use of streets by foot passengers, vehicles, railways and engines, and to grant franchises and locations to street railway companies for the operation of railways. The constitutionality of this statute was sustained. The powers thus referred to are properly classed among the police powers of the municipality, and it seems that the full police power of the state on this subject was vested in said board.

Mr. Justice Pitney said:

> "The distinction between the police power and the taxing power is entirely clear. The former extends merely to the regulation of those matters that are confided by the legislature to the municipal corporation for that purpose, including the power to exact reasonable fees, not for the purpose of revenue, but only as incidental to the power of regulation. The power of taxation is exerted in order to compel citizens and property owners to contribute to the support of the municipal government. Tiedm. Mun. Corp. 116, 123, 124, 253; Dill. Mun. Corp. (4th ed.), 141, 357, 360, 768. The power to regulate the use of the public streets, including limitations upon the speed of travel, the exclusion of vehicles from the side-walks, the regulation of public conveyances, and the like are instances of the exercise of the police power. Id., 393"

The learned Justice fully and exhaustively reviewed the authorities and particularly cited the cases distinguishing the police and taxing power and stated:

> "It is needless to say that this extended reference to familiar decisions has been made, not for the purpose of showing the existence of a distinction that is so universally recognized, but for the purpose of showing how rational is the distinction, and how easy of application; and in order to demonstrate how impossible it is that a power conferred by the

legislature for the purpose of regulating the streets of a city, and the use of the streets by traction companies and others, can, by any defensible interpretation, be so stretched as to cover an ordinance of the character of that now before us. The traction company is in the enjoyment of a public franchise granted by the legislature; it has a use of the streets differing only in kind from that of other citizens using them, and has no interest in the soil; it is under a general obligation to keep its rails in repair so they shall not become an obstruction to travel; it is also bound by any contract it may lawfully have made with the municipality in consideration of the grant of its local privileges. But, entirely independent of any such consideration, and irrespective of any disturbance of the street surface in the operation of the railway, this ordinance attempts to impose upon every traction company the duty to pave a considerable portion of every street over which it passes, although it may bring no additional wear and tear upon the pavement; and the further duty to keep such pavement, when laid, at all times in repair. To call this "regulation," or an exercise of the police power, is a misuse of terms. It is taxation, pure and simple. It calls upon the company to perform a function not essentially different in character, although vastly more onerous, than the once-familiar operation known as "working out" the township road taxes by the labor of the inhabitants. Gen. Stat., p. 2817, 51, etc. A power that will not support the imposition of license fees fixed on a revenue basis, will certainly not support an ordinance of this character.

"We therefore hold that the ordinance is not supportable as an exercise of the police power; and since no other legislative authority exists for its enactment, it imposed no duty upon the defendant company to repair the pavement between its rails or to repave that portion of the street."

It is respectfully submitted that the authorities and

the reasoning of Mr. Justice Pitney reinforced by the other decisions cited demonstrates that the imposition to be imposed upon this street car company of paving the parts of the streets which the tracks occupy cannot be sustained under the police power of the State.

ARBITRARY CLASSIFICATION

It was alleged in the Answer (and supported by the evidence) that Act 680 is so framed that it reached only one company in the State operating street cars; and was an arbitrary classification imposing a burden upon a single company, and void as conflicting with the Fourteenth Amendment to the Constitution of the United States in that it denied the equal protection of the law to it while excluding from its terms similar companies in like situation; and that it was taking private property to pay for public improvements without compensation, and void as denying due process of law.

The facts are quite simple; there are eight companies operating street cars in ten cities in Arkansas. Two of these companies were operating under Indeterminate Permits and six were operating under franchises granted by the respective municipalities. Notwithstanding Act 124 of 1921 (Appendix H) promised companies holding Indeterminate Permits that if they continued to hold them, they would be regulated only as other and like utilities were regulated, the Bill for this Act classified all companies operating street railways under Indeterminate Permits in cities of the first class, and none other, as the subject of this imposition. It is impossible to find any substantial distinction between street car companies operating in cities, regarding paving the streets occupied by them, by reason of operating under Indeterminate Permits instead of franchises, where there is no inherent difference in the operation of the street cars in any of these cities and none is shown in the evidence. There is no marked difference in the population of the cities; they range from a population of fifteen thousand to seventy thousand, Fort Smith being about half way between the extremes,—forty thousand.

In some of the cities, paving requirements were by contract imposed upon the companies, and in other cities, there was no contractual obligation for paving; and no such obligation existed under the law. The Bill for this Act singled out those two companies operating under Indeterminate Permits as a proper subject of regulation in regard to paving burdens, notwithstanding such notable instances as North Little Rock and Pine Bluff operating under franchises where there were no paving obligations imposed upon the companies. This Bill said that these companies, because they had Indeterminate Permits from the Corporation Commission rather than franchises from city councils, should carry the burden of paving the space occupied by their tracks and to the end of the ties thereof. Such classification could have no future operation because the Indeterminate Permit law was repealed in 1921 by said Act 124, and only such corporations which did not surrender their Indeterminate Permits under the terms thereof could thereafter operate in Arkansas under Indeterminate Permits, hence the Act could have no prospective application.

Many Acts with classification which would have a prospective application have been sustained; as, for instance, all cities having a given population; if there were none other at that time, it was presumed there would be others at some future time, McLaughlin vs. Ford, 168 Ark., 1108; Arkansas-Ash Lumber Co., vs. Price, 162 Ark., 235. In this instance, this classification was a fixed quantity applying only to Fort Smith Light & Traction Company and the Southwestern Gas & Electric Company of Texarkana, and could never apply to any other company as there were no companies capable of coming under that classification in the future. However, this was but the beginning of the arbitrary classification.

The Bill was amended by striking out its application to Miller County, which excluded the Southwestern Gas & Electric Company from its operation, and in that form passed both Houses and received the signature of the Governor and has been declared to be a valid law by the State courts.

In answer to the contention that such classification was arbitrary and discriminatory, the Supreme Court of Arkansas in this case said:

> "(2) The Act does not offend against the clause inhibiting discrimination between parties similarly situated because there is only one street railway in that particular locality. There is no other street car line in that particular locality to be classified; so the doctrine of classification has no application." (R. P. 43.)

Just how narrow a locality has to be in order that it may sustain a classification, or how broad its limits may be, is not indicated.

A classification upon the tenure of right—the character of the franchise—was made in the Bill for the Act, but the Act split that classification in half and applied a burden to one and excluded the other member of class. Now the Court sustains the General Assembly on the theory that no other company is geographically located near this one.

Little Rock and North Little Rock are only separated by the Arkansas River, and under the theory of the Court, they would have to be classified together; yet, the facts are that in Little Rock, the street car companies are required to pave their tracks, and in North Little Rock they are not; therefore, if the Legislature would pass an Act requiring a company in Little Rock and would not require the company in North Little Rock to pave, it would be arbitrary and invalid; but as there is no street car company close to the one operated by the Fort Smith Light & Traction Company, the Legislature is free to class it unto itself, which it has done in this Act.

Hot Springs and Pine Bluff are about fifty miles apart. In each, the company is operating 13 miles of track; one has 15,000 population and the other 25,000; both operating under franchises. In Hot Springs, with the lesser population, the company is required to pave between its tracks and one foot outside thereof, and in Pine Bluff is

not required to pave at all. Of course, these are local contracts, but if the Legislature were to attempt to require the Hot Springs company to pave instead of the council doing it, it would have to include Pine Bluff in it because they are in the same locality; at least, we would assume that cities in as large a state as Arkansas, within fifty miles of each other, would be deemed to be within a "particular locality." However, if that is too broad, then the question would be presented "what is a locality?" in order that companies operating within certain miles of each other could be classified together?

If this is the proper definition of classification within the meaning of constitutional law, we have failed to read the cases aright.

With these facts before the Court, your attention is invited to a few of the leading cases on this subject:

In Gulf, Colorado & Santa Fe Ry. vs. Ellis, 166 U. S., 150, the Court said:

> "But arbitrary selection can never be justified by calling it classification. The equal protection demanded by the Fourteenth Amendment forbids this."

This statement from Cooley on Constitutional Limitations, 5th Ed., 484-486, has been approved in the case of Cotting vs. Goddard, 183 U. S., 79:

> "Everyone has a right to demand that he be governed by general rules, and a special statute which, without his consent, singles his case out as one to be regulated by a different law from that which is applied in all similar cases, would not be legitimate legislation, but would be such an arbitrary mandate as is not within the province of free governments."

In Cotting vs. Goddard, 183 U. S., 79, the Court had before it a statute of Kansas regulating stock yards; the regulation was according to the quantity of the business done and the business was so classified that it only applied to one stock yard company in the State of Kansas. The Court said:

> "But while recognizing to the full extent the impossibility of an imposition of duties and obligations mathematically equal upon all, and also recognizing the right of classification of industries and occupations, we must nevertheless always remember that the equal protection of the law is guaranteed, and that such equal protection is denied when upon one of two parties engaged in the same kind of business and under the same conditions burdens are cast which are not cast upon the other. * * * * If once the door is opened to the affirmance of the proposition that a State may regulate one who does much business, while not regulating another who does not the same but less business, then all significance in the guaranty of the equal protection of the laws is lost, and the door is opened to that inequality of legislation which Mr. Justice Catron referred to in the quotation above made. This statute is not simply legislation which in its indirect results affects different individuals or corporations differently, nor with those in which a classification is based upon inherent differences in the character of the business, but is positive and direct discrimination between persons engaged in the same class of business which each may do. If such legislation does not deny the equal protection of the laws, we are unable to perceive what legislation would."

In Connolly vs. Union Sewer Pipe Co., 184 U. S., 540, the Court dealt with an exemption in an Act under review similar in principle to the exemption of Miller County in this Act. The Court fully reviewed the decisions bearing upon the constitutional question involved, and said:

> "The principles, applied to the case before us, condemn the statute of Illinois. We have seen that under that statute all except producers of agricultural commodities and raisers of live stock, who combine their capital, skill, or acts for any of the purposes named in the act, may be punished as criminals, while agriculturalists and live-stock raisers, in respect of their products or live stock in hand, are exempted

from the operation of the statute, and may combine and do that which, if done by others, would be a crime against the state. The statute so provides notwithstanding persons engaged in trade or in the sale of merchandise and commodities, within the limits of a state, and agriculturalists and raisers of live stock, are all in the same general class, that is, they are all alike engaged in domestic trade, which is, of right open to all, subject to such regulations, applicable to all in like conditions, as the state may legally prescribe.

"The difficulty is not met by saying that, generally speaking, the state when enacting laws, may, in its discretion, make a classification of persons, firms, corporations, and associations, in order to subserve public objects. For this court has held that classification "must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrary and without any such basis * * * * But arbitrary selection can never be justified by calling it classification. The equal protection demanded by the 14th Amendment forbids this * * * * No duty rests more imperatively upon the courts than the enforcement of those constitutional provisions intended to secure that equality of rights which is the foundation of free government * * * * It is apparent that the mere fact of classification is not sufficient to relieve a statute from the reach of equality clause of the 14th Amendment, and that in all cases it must appear, not only that a classification has been made, but also that it is one based upon some reasonable ground—some difference which bears a just and proper relation to the attempted classification,—and is not a mere arbitrary selection." (citing many cases.)

The Cotting case is annotated in 18 Roses' Notes, beginning on page 882, and the Connolly case is annotated in 18 Roses' Notes, beginning on page 1025. These annotations showing the application of the principles of these

cases to many city ordinances, state statutes and acts of Congress, from this Court, the lower Federal Courts and the State Courts, contain a complete treatise on this subject. The principles herein involved have been applied to so many acts containing less flagrant arbitrary classification and discrimination than this one that it seems impossible to escape the conclusion, from review of the cases, that no such Act has ever been sustained by any court except in the instant case.

One case, however, resting on the classification of cities as a basis for an occupation tax there, is an interesting application of the principles laid down in the Cotting and Connolly cases. Hager vs. Walker, 128 Ky., 21; 15 L. R. A., (N. S.) 195. An useful note on kindred decisions is given to the case as reported in L. R. A. above cited.

Another case, Detroit, G. H. & M. Ry. Co. vs. Fuller, 205, Fed., 86, presented this issue: The Detroit Grand Haven & Milwaukee Ry. Company was a specially chartered railway company in Michigan. It was the only one specially chartered in the state. All of the other railroads operating in the state were chartered under general laws, and an Act was passed seeking to impose taxes only upon the stock, bonds and other evidence of indebtedness of specially chartered railroads.

While general in its terms it singled out this particular railroad, because it was the only one in the state to which it applied.

The Court said:

> "No real and substantial distinction upon which to base a classification for the purpose of taxation exists between the stockholders, bondholders, and other creditors of that company and the stockholders, bondholders, and other creditors of other Michigan Railway Companies."

The Court held that such an Act constituted class legislation in contravention of the Fourteenth Amendment, and the Act and the taxes assessed under it were void.

In Radice vs. New York, 264, U. S., 292, the Court, in giving consideration to this subject, stated:

> "The statute does not present a case where some persons of a class are selected for special restraint from which others of the same class are left free (Connolly vs. Union Sewer Pipe Co., 184 U. S., 540, 564); but a case where all in the same class of work are included in the restraint."

The Supreme Court of Arkansas sustained this Act on the theory of amending charters, which subject is hereinafter separately discussed, but while considering the arbitrary character of the classification, it is well to note that the constitutional protection herein referred to is applicable to a statute sought to be sustained under the reservations to amend and alter charters as well as when they are sought to be sustained upon the police or taxing powers. One of the strongest and best written opinions on this subject was that written by the late Mr. Justice Battle speaking for the Supreme Court of Arkansas in St. L. I. M. & S. R. R. Co., vs. Paul, 64 Ark., 83. This case considered the same statute that had been sustained under the theory of amending charters in Leep vs. St. L. I. M. & S. Ry. Co., 58 Ark., 407, which statute, as construed, required railroad corporations to pay certain employes their wages on discharge. Mr. Justice Battle reviewed the "Railroad Tax cases" and the "Sinking Fund cases" and other decisions of this Court on this subject. He quoted from Missouri Pacific Railway Co., vs. Mackey, 127 U. S., 205, the following:

> "Corporations are the creation of the state, endowed with such faculties as the state bestows and subject to such conditions as the state imposes, and if the power to modify their charters is reserved, that reservation is a part of the contract, and no change within the legitimate exercise of the power can be said to impair its obligation; and as this amendment rested on reasons deduced from the peculiar character of the business of the corporations affected and the public nature of their functions,

> *and applied to all alike,* the equal protection of the law was not denied." (Italics ours.)

Justice Battle differentiated this case from the Gulf, Colorado & Santa Fe Ry. Co., vs. Ellis, 166 U. S., 150 and this Court, on appeal, stated it "was properly distinguished." This case was carried to this Court and was affirmed in St. L., I. M. & S. R. Co. vs. Paul, 173 U. S., 404.

In Arkansas Stave Company vs. State, 94 Ark., 27, the Court had before it a statute requiring corporations to have two regular pay days each month. It was attacked, among other grounds, as denying the equal protection of the law. It was sustained on the reserved power of the General Assembly to alter and amend charters, and the Court reviewed the opinions in the Leep and Paul cases, and quoted from the decision of Chief Justice Fuller in the latter case, after reviewing other authorities, the Court stated:

> "Nor does this act deny to the defendant the equal protection of the law. It applies to all corporations. Within the sphere of its operation all artificial persons are treated alike under like circumstances and conditions. Because the act only applies to corporations and not to natural persons, it does not contravene the equal protection clause of the Federal Constitution. Nearly all legislation is special, either in the objects sought to be attained or in its application to classes. And the general rule is that legislation does not infringe the constitutional right of equal protection where all persons, whether natural or artificial, of such class are *treated alike under like circumstances and conditions.*" (Italics ours.)

Thus it is seen that even where statutes are sustained under the theory of amending charters, that they must apply to all alike, which are operating under like circumstances and conditions. Where it fails to apply to all corporations of like class, under like circumstances, then

it is offensive to the equal protection clause of the Constitation, and is void.

Certainly in this case where, of eight companies operating street railways in the state, to single out two according to the right under which they operate, and to impose upon them a burden not related to the right under which they were operating, but relating to their physical operations, where there were six others in like circumstances and in like business that were exempted from the burdens sought to be imposed here, such a classification fell without the pale. Where, in order to get this Act through as a local and special Bill, it was amended so as to cut it in two, applying its terms to one-half of those in the class selected, certainly this company has not been given equal protection of the law as guaranteed by the Federal Constitution.

AMENDING THE CHARTER OF A CORPORATION

As an aftermath of the Dartmouth College case, the States began reserving the right when they created corporations to protect the public interest by stipulating that the charters were subject to amendment—some of them, like Arkansas, on condition that no injustice be done the incorporators by the amendment. The system of special charters also gave way to a system of incorporating through general law, the Constitution makers in the various states realizing the incongruity and discrimination of special charters.

Amendments to charters of corporations—like statutes creating them—must conform to constitutional provisions.

The controlling thought running through the constitutions and decisions was protection to the public against contractual rights conferred by law on creatures of law.

This case presents a phase of the subject apparently never before sustained by any court, if ever presented to any court, and it is this: An Act, not to further any public interest, but solely to relieve abutting property owners of a part of a self-imposed tax then existing as

a lien against their property, and purported to apply to a class, which class consisted of two corporations, and was made applicable to one of them, is sustained by the State court on the theory that it was an amendment of the charter of this particular company, although the constitution forbade creation of corporations except under general laws, and the decisions were that amendments to an act had the same effect as if part of the original creating statute, which necessarily were general laws, and the court further held that this particular act was a local one, and gave retroactive effect, relieving the abutting property owners, as well as prospective effect, to impose a burden on this corporation not imposed on any other corporation operating street cars in the state; thereby in the future relieving abutting property owners of a part of the cost of local improvements solely payable from assessments on real estate.

The Act is otherwise shown to be an impairment of the obligation of a contract between the state and this company, and arbitrary and discriminatory legislation, and not under the constitution of Arkansas sustainable under the police power. The question then is whether the characterization of it by the state court as an amendment of charters can prevent this court declaring its true effect.

In Hammond Packing Co., vs. Arkansas, 212 U. S., 322, this Court had before it a decision of the Supreme Court of Arkansas wherein the clause of the Constitution of the State providing that the state reserves the power to alter and amend charters of incorporation, but the power should be exercised in such a manner, however, that no injustice be done the incorporators, was considered, and the Court said:

> "The determination whether the power to repeal, alter, or amend was exerted in such a manner as to be unjust to incorporators was within the province of the state court to finally decide, unless that power was exerted in such an arbitrary manner as, irrespective of the contract clause, to deprive of some

other and fundamental right which was within the protection of the Constitution of the United States."

In Davis vs. Wechsler, 263 U. S., 22, the Court said:

"Whatever springes the state may set for those who are endeavoring to assert rights that the state confers, the assertion of Federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice. * * * *. The state courts may deal with that as they think proper in local matters, but they cannot treat it as defeating a plain assertion of Federal right. The principle is general and necessary. Ward vs. Love County, 253, U. S., 17, 22. If the Constitution and laws of the United States are to be enforced, this Court cannot accept as final the decision of the state tribunal as to what are the facts alleged to give rise to the right or to bar the assertion of it even upon local grounds. Creswell vs. Grand Lodge, 225 U. S., 246. This is familiar as to the substantive law, and for the same reasons it is necessary to see that local practice shall not be allowed to put unreasonable obstacles in the way."

The Court quoted and applied this statement in Railroad Commission vs. Eastern Texas R. Co., 264 U. S., 79.

In St. Louis S. W. R. Co., vs. Arkansas Ex Rel. Norwood, 235 Ark., 350, this Court said:

"Upon the mere question of construction we are, of course, concluded by the decision of the state court of last resort. But when the question is whether a tax imposed by a state deprives a party of rights secured by the Federal Constitution, the decision is not dependent upon the form in which the taxing scheme is cast, nor upon the characterization of that scheme as adopted by the state court. We must regard the substance, rather than the form, and the controlling test is to be found in the operation

and effect of the law as applied and enforced by the state." (Citing many cases.)

In St. Louis Cotton Compress Co., vs. Arkansas, 260 U. S., 346, this Court followed and cited the above decision and stated:

> "The supreme court justified the imposition as an occupation tax—that is, as we understand it, a tax upon the occupation of the defendant. But this court, although bound by the construction that the supreme court may put upon the statute, is not bound by the characterization of it, so far as that characterization may bear upon the question of its constitutional effect. St. Louis Southwestern R. Co., vs. Arkansas, 235 U. S., 350, 362.

The above case was expressly approved in New York, Philadelphia & Norfolk Telegraph Co., vs. Dolan, 265 U. S., 96.

This phase of this subject is particularly set up in the sixth Assignment of Errors which is as follows:

> "Sixth. The decision of the Supreme Court of Arkansas in sustaining Act 680 of the General Assembly of 1923, on the ground of it being an Amendment of the charter of the petitioner constitutes an evasion of the petitioner's constitutional rights set up in its answer in that said act did not purport to be, and was not, intended as an amendment of charters which under the Constitution of Arkansas can only be amended by a general Act, not a special one, and the Court in so sustaining it does so in the guise of the construction of the local constitution and the construction of a local act, when in fact the imposition provided for in said Act against the petitioner amounts to the taking of private property for public use without just compensation and taking of petitioner's property without due process of law, contrary to the Fourteenth Amendment to the Constitution of the United States, and as an impairment of the petitioner's contractual rights, contrary to

Section 10 of Article I of the Constitution of the United States, which constitutional provisions are specially set up and relied upon in the petitioner's answer." (R. P. 50.)

In support of this Assignment of Error, we call attention to principles heretofore announced by the Supreme Court of Arkansas with which the present announcement sustaining this Act as an amendment of charters is at war.

(A) Your attention is first directed to the Act itself. (R. P. 24.) It does not purport to be an amendment of the charter, but, as written, it applies to "all persons, firms or corporations operating a street railway system under an Indeterminate Permit;" hence, it is impossible to impute to the Legislature the intention of amending charters of corporations when the Legislature itself makes the terms of the Act apply to individuals and partnerships as well as corporations. It is true that, to save the constitutionality of an Act, the Court may cut out unconstitutional features, as in Leep vs. Railroad, 58 Ark., 407, the Court cut out the individuals and let the Act stand as to corporations on the ground of amending charters thereof, thereby giving the legislative intent as broad an effect as it was possible to give it within constitutional limits. However, where a statute includes persons who may not be bound with those who may be bound, and is void as to those not capable of being bound; yet, where their exclusion leaves a statute discriminating between persons in classes of like conditions, the whole statute is void. This is illustrated in Ex parte Deeds, 75 Ark., 542, where that Court applied the principle of discriminatory exemption as announced by this Court in Connolly vs. Union Sewer Pipe Co., 184 U. S., 540, to strike down the statute in its entirety. There is no evidence in the Record whether any of the persons operating street railways in Arkansas are individuals or partnerships. They probably are corporations and their names are given on Record Page 31, and are in such form as to leave the impression that they are corporations, although there may be individuals or partnerships pro-

ceeding under the titles therein set out; however this may be, it is competent, under the laws of Arkansas, for a person or partnership to operate a street car system.

A general Act must operate upon all in like conditions, and this Act would, under the decision of the Court in this case, be void as to individuals or partnerships operating street railway systems, but valid as to corporations under the power to amend, but when the individuals or partnerships thus operating are excluded, then their exemption, under the Connolly case as construed by the Supreme Court of Arkansas, would render the entire Act void.

(B) When an amendatory provision of an Act is passed, it becomes a part of the Act in relation to other sections of the Act prospectively as though the Act had originally been enacted in its amended form. Abney vs. Warren, 143 Ark., 572; McLaughlin vs. Ford, 168 Ark., 1108; Mondschein vs. State, 55 Ark., 389; Henderson vs. Dearing, 89 Ark., 598. Therefore, when this Act 680 was enacted, it now being construed as an amendment to the charter of this company, then it stood, in its operations after its passage, in relation to other provisions of the laws of Arkansas authorizing the incorporation of companies to operate street car systems, as if written therein that from and after that date, the Fort Smith Light & Traction Company should, in the events named in the Act, pave the streets occupied by it, but no other company so organized should be required to do so.

Section 2, Article XII, of the Constitution of '74, reads "The General Assembly shall pass no special act conferring corporate powers," with exceptions not pertinent here.

Section 3 provides: "The General Assembly shall provide, by general laws, for the organization of cities," and other provisions not pertinent.

Section 6 reads as follows:

> "Corporations may be formed under general laws, which laws may, from time to time, be altered or

repealed. The General Assembly shall have the power to alter, revoke or annul any charter of incorporation now existing and revocable at the adoption of this Constitution, or any that may hereafter be created, whenever, in their opinion, it may be injurious to the citizens of this State, in such manner, however, that no injustice shall be done to the corporators."

A leading case in Arkansas construing the amendment of charters is Leep vs. Railroad, 58 Ark., 407, written by Justice Battle who was a member of the Convention which framed the Constitution of 1874. On page 439 of the opinion, while quoting a definition of general laws, he inserted in brackets in that quotation, the question: "If amendments to charters" could be made by special Acts?

In the latter case, also written by Justice Battle, Ozan Lumber Co. vs. Biddie, 87 Ark., 587, the Court plainly indicated that amendments to charters could only be made by general laws.

The Supreme Court has held that this was a local Act; it has held it operated as an amendment to the charter of this company, and yet the Constitution plainly requires corporations shall be formed under general laws only, and the Court has consistently held that amendments fall into and become a part of the original enactment; and that these original enactments and their amendments constitute the charters, and necessarily the amendment must be general as well as the original act.

The answer which the Court gives to these provisions of the Constitution is as follows:

"Learned counsel for appellant contend, however, that because 'corporations may be formed under general law, which may, from time to time be altered or repealed,' Sec. 6, of Art. 12 of the Constitution; and because 'the General Assembly shall pass no special act conferring corporate powers,' except in certain cases, Sec. 2 Article 12 of the Constitution, that the General Assembly cannot amend charters by

special or local act. The inhibition is that the General Assembly cannot confer corporate powers by special act. The act in question did not attempt to confer corporate powers upon appellant but to impose a burden within the reserve powers of the state upon it. The Constitution does not prohibit this from being done. Of course, the reserve power of the state to alter, revoke, or annul charters issued to corporations has its limitations." (R. P. 44.)

This answer does not reach to the real question that charters cannot be granted, and, necessarily, cannot be amended, except by general laws. Moreover, the Supreme Court of Arkansas, in 1880, in the case of the City of Little Rock vs. Parish, 36 Ark., 166, answered the proposition now asserted by the Court. It will be noted that Section 3, Article 12, provides for cities to be organized under general laws just as Section 6 provides for private corporations to be organized thereunder, and Section 2, forbidding the conferring of powers by special acts applies to municipal corporations and private corporations. Duval platted an addition to the city of Little Rock and it was accepted as a part of the city for many years. In 1877, the Legislature passed an Act defining the boundary line of Little Rock, the effect of which was to cut Duval's Addition out of the city. The Court said:

"Moreover, Art. XII, sec. 2, of the constitution of 1874, contains an unqualified prohibition of any special act, conferring corporate powers, except for peculiar classes of corporations, not here involved. By this, unlike the former prohibition of special acts, it is not left to the legislature to determine whether or not a general act could be made applicable. The injunction to pass general laws for the organization of cities, etc., and the prohibition of special acts, conferring corporate powers, are both positive, and unqualified in any way to affect this question. Under constitutions, with similar provisions in other states, the courts have not confined the meaning of the word 'powers' to the different degrees of legislative,

judicial or police powers, regardless of the area over which they are to be exercised, but have held the legislature incompetent to extend the area also, by additions to the cities. In Ohio, from which state these provisions seem to have been adopted by several other states, the leading case upon this subject is The State ex rel. vs. The City of Cincinnati, 20 Ohio St., p. 18.

"The reasoning of the court is unanswerable, and the case has been followed in Kansas.

"Assenting to it very heartily, it would be absurd to hold that the legislature had power to reduce but not increase, the area of a city. It is literally true that such action would *confer* no powers whatever; but constitutions, like statutes and private writings, are to be construed acording to their plain intent, derived from the language and context. Of what avail would it be to prohibit the legislature from conferring special powers on favored municipalities, if it might first confer them by general act on all in the state, and then by special acts, trim down to a general level, and shackle all not meant to be favored? Besides, a distinction in this regard, between the power to increase and a power to diminish the area of cities, can be rested on no plausible foundation of reason.

"We can not entertain a reasonable doubt that the constitution intended that all municipalities of the same class should be put upon the same footing, with the same modes of creation, increase and contraction of territory, and powers of government, and to prohibit all legislative interference, producing the diversities and inconveniences which the system of special charters had shown to be detrimental."

The substance of the decision in this case is, that because the statute conferred burdens, these burdens may be imposed through a local act, while if they are conferred rights, these rights must have been conferred by general law.

As pointed out by the same court forty-six years ago, in the decision quoted from, such a position is untenable; because under such ruling, by local acts, every corporation, except a favored one, might be regulated by imposing burdens upon it not imposed on the one left alone under the general act, and in the last analysis, there might be one corporation alone operating under a general statute. This result, sanctioned by the court, permitting burdens to be imposed by local acts, when they are not imposed by general acts, brings about the very situation which the Constitution intended to prevent; that is, that all corporations of the same class should be put upon the same footing and to prevent all legislative interference authorizing the diversities and inconveniences which a system of special charters produces, and which the Constitution makers regarded as detrimental.

In the face of such reasoning, it is submitted, with due respect to the Supreme Court of Arkansas, that its characterization of this Act as an amendment to charters is contrary to the Constitution of Arkansas, as heretofore construed and to sound reasoning; hence, the real substance of the Act must be looked to by this Court, rather than its characterization by the State Court, and when the real substance of the Act is looked to, it is seen to be clearly an impairment of the obligation of two contracts made with the State, one in the Act of 1919, and again in the Act of 1921; and, further it is an arbitrary classification in opposition to the Fourteenth Amendment.

This Court has not hesitated in such cases to refuse to accept the state court's characterization of an Act as an amendment of charters when such characterization is in the face of decisions of that State and based on untenable reasoning, where an asserted Federal right is involved.

Your attention is called on this subject to Superior Water, Light & Power Co., vs. City of Superior, 263 U. S., 125. This arose in Wisconsin and the constitutional provisions of that state as set out in the opinion are

identical in substance with the Constitution of Arkansas. The village of Superior granted a franchise to a Water Company for a period of thirty years, and provided that, at the expiration of thirty years, the charter should be extended for another thirty years unless the city should purchase the water plant at a fair valuation as provided in the Act. In 1907, Wisconsin enacted a public utility law, the prototype of many modern laws in many states. It authorized public utilities to surrender their franchises and accept, in lieu thereof, Indeterminate Permits. This company did not surrender its franchise and did not accept the Indeterminate Permit. In 1911, the Wisconsin Legislature repealed the optional feature of the Act of 1907 and directed that every license, permit or franchise granted by any municipality "is so altered and amended as to constitute and to be an Indeterminate Permit within the terms and meaning of" the Act of 1907. At the expiration of the thirty years, the water company insisted upon its rights under the original franchise which it had not surrendered, and the State insisted that its rights were only those contained in an Indeterminate Permit as it contended that its charter had been amended by the Act of 1911, and this was the issue presented to this Court. The Court first held that it seemed clear enough that a valid contract resulted from the dealings of the city of Superior and the water company. The Wisconsin Court conceded that it was a contract, but held that the Legislature had power to change this contract under the reservation permitting alterations, in the State Constitution, and that the Act of 1911 did not impair the contract by substituting for the rights secured in it an Indeterminate Permit. The Court then pointed out that, through a contract in the franchise, the water company had acquired valuable property rights, and while they were not directly acquired by any statute, they were the outgrowth of an agreement with a fully empowered corporation.

In order to emphasize the similarity of the issue presented with the one here, we will interpolate into the discussion of the Superior case the consideration of Russell vs. Sebastian, 233 U. S., 195. The question there

arose as to an offer made in the State Constitution by the State to certain utilities. This Court, through Mr. Justice Hughes, said:

> "When the voice of the state declares that it is bound if its offer is accepted, and the question simply is with respect to the scope of the obligation, we should be slow to conclude that only a revocable license was intended. Moreover, the provision plainly contemplated the establishment of a plant devoted to the described public service and an assumption of the duty to perform that service. That the grant, resulting from an acceptance of the state's offer, constituted a contract, and vested in the accepting individual or corporation a property right, protected by the Federal Constitution, is not open to dispute in view of the repeated decisions of this court."

When the State of Arkansas made its offer in 1919 to the public utilities to surrender their franchises and accept an Indeterminate Permit, and again in 1921 to retain their Indeterminate Permit, under the condition that they would only be regulated as other and like utilities were regulated, then the acceptance by the utility of that option given it by the State constituted a contract just as binding as the contract in the franchise between the water company and the village of Superior.

Returning to the consideration of the Superior case, after pointing out that the Wisconsin Court had sustained the legislation as an amendment to the charter, and further pointing out that it was a contract that was thus amended, the Court said:

> "None of the decisions of the supreme court of Wisconsin prior to 1889 to which we have been referred construes the reservation in the state Constitution as having the extraordinary scope accorded to it below; and certainly, in the absence of some very clear and definite pronouncement, we cannot accept the view that it then had the meaning now attributed to it."

Then the Court reviewed the decisions of the Wisconsin Court on this subject, and held that it was beyond the competency of the Legislature to substitute an Indeterminate Permit for franchise rights under the guise of amending the charter to that effect.

In Railroad Commission vs. Eastern Texas Railroad Co., 264 U. S., 79, the Court said that a state has many laws relating to railroads on its statute books which do not become a part of the charter contract, such as laws containing specific regulations respecting the safety of employees and travelers, liability for injuries, facilities for handling and moving traffic, and other regulatory matters. The Court thought the occasion for keeping such matters where the Legislature may deal with them as changing conditions may require, forbid that they be regarded as part of the charter contract unless the purpose to make them such be plainly disclosed.

Consequently, if these regulatory provisions had been passed as this Act, which purports to be a regulatory one, even if an original proposition, they would not be imparted in the charter, and much less so when in the form of an amendatory Act not evidencing such a purpose, but, on the contrary, purporting to apply to individuals and partnerships as well as corporations.

In C. B. & Q. R. R. Co. vs. Railroad Commission, 237 U. S., 220, there was before this Court a statute of Wisconsin requiring every corporation operating a railroad to maintain a railroad station in every village containing a Post Office and having more than 200 inhabitants, and other like provisions. It was insisted that the statute was valid as an amendment to the charter of this particular railroad before the Court. After noting that this contention had not been presented in the state court, this Court said:

> * * * * "and, besides, we would be very averse to deciding that, without explicit declaration, every general law of the state applicable to corporations is enacted as an amendment to their charters."

and further said:

> "It is one thing to decide that corporations are subject to the police power of the state, and quite another to hold that every general law is an amendment to their charters."

In view of the prohibition of the Arkansas Constitution against local laws conferring corporate powers, rights or burdens, there is a stronger reason for holding that a local act purporting to be a regulation was not an amendment of the charter, than if such regulation was in a general act.

It was respectfully submitted that the Supreme Court of Arkansas has inaptly characterized this Act as an amendment of charter; and the act is in substance an arbitrary exercise of the legislative power and an impairment of the contract between the state and the company which cannot be validated by naming the act an amendment of charter.

THE CONNECTICUT CASE

The Supreme Court of Arkansas sustained Act 680 under the authority of Fair Haven & Westville Railway Co. vs. New Haven, 75 Conn., 442, affirmed in the Supreme Court of the United States under the same title, 203 U. S., 379. A consideration of this case and its differentiation from the instant one is invited.

As seen from the opinion in the Connecticut court, the primary question under consideration was whether an Act of 1899 had repealed an Act of 1895. These Acts provided different methods of apportioning paving costs on a street car company. Under the application of the Act of 1895, an assessment in round numbers of $36,000 was charged against the street car company, but the lower court held that that Act was repealed, and applied a rule under the Act of 1899 and found an amount of $5,000 against the company. The Supreme Court of Connecticut reversed this decision on the ground that that Act of 1899 did not repeal the Act of 1895, and the Act of 1895 was in effect. The facts in that case were as follows: Section 9 of the charter of the company

authorized the common council to establish regulations in regard to street railways as might be required "for paving * * * in and along the street." It was further therein provided that the company should keep that portion of the street over which should be laid its tracks and two feet on each side in good repair without expense to the city or abutting property owners.

Section 13 provided expressly that the Act might be altered, amended or repealed at the pleasure of the Legislature.

In 1893, a general law was passed applicable to all street railways requiring the company to keep in repair the space occupied by the tracks and two feet on each side thereof. In 1895, an Act was passed especially providing for the companies paving the streets occupied by them and that the paving done by them should be nine feet wide. The question was whether this Act impaired the obligation of the contract. The Supreme Court of the United States questioned whether this Act imposed an additional burden over the original requirements, but assumed that it did, and decided that such obligation was consistent with the object of the grant and was not imposed in sheer oppression and wrong, and the good faith of the state in this matter could not be questioned.

The radical differences between that situation and the one at bar are as follows:

(A) In this case, the paving obligation had, by contract, been assumed by this company when it took a franchise from the city, but many years later, at the invitation of the state, the company surrendered its franchises for a valuable consideration, and was thereby relieved of this paving obligation.

Four years thereafter, the state reimposed the dissolved obligation upon this company alone, leaving untouched seven other companies operating street railways in Arkansas, and leaving one other company, which operated under the same tenure as this company, untouched by this burden, and did not re-invest this com-

pany with any of the rights which it had surrendered in consideration of being relieved of this burden. No such situation was presented in Connecticut.

(B) It was not within the competency of the General Assembly of Arkansas to grant to an improvement district a source of revenue to pay for the improvement for which the district was created other than through benefit assessments on abutting real estate. Whaley vs. Northern Road Improvement District, 152 Ark., 573. And it was further held in this case that it was not within the competency of the Legislature through the taxing power, to levy a tax on personal property or a privilege tax within the limits of an improvement district. No such constitutional limitations existed in Connecticut.

(C) The Connecticut Court said:

> "It cast a portion of the attendant burden upon abutting property owners, and another portion upon the corporation which enjoyed the exclusive public franchise of operating a street railway in the street to be paved. The extent of the latter burden was limited to the actual cost of the pavement laid upon that portion of the street which was peculiarly appropriated to the special use of this corporation."

In this case, in consideration of an exclusive franchise on Garrison Avenue, (and other valuable rights) the company assumed the burden of paving, many years prior to this Act; but, at the invitation of the State, it surrendered this exclusive right in part consideration of being relieved of this burden, and then the burden was reimposed but no exclusive right restored to the company on this street; and the city or state may now grant any other street car company the right to use Garrison Avenue in competition with this company.

The Connecticut Court also referred to the use of a portion of the street by the street car company as a portion "which was peculiarly appropriated to the special use of this corporation." The evidence in this case is to the contrary; it shows that the portion of the street

where the pavement was constructed by this company in 1912 was, at the time of the passage of Act 680, the portion of the street most generally used by the public owing to the fact that this company had constructed a good pavement and the city and improvement district had constructed a bad pavement in the rest of the street, and this situation had thrown practically all the traffic on Garrison Avenue on that part of the pavement constructed by this company and occupied in small part by its double tracks.

Therefore one of the principal reasons given to sustain the charge of this imposition in Connecticut is conspicuous by its absence here. There is, however, a radical difference between the use of the streets by street cars in 1873, when the original burden was placed on the Connecticut street car company, and in 1895, when the Act in question was passed, than existed in 1923, when Act 680 sought to impose this burden upon this company.

It is well stated in re Omaha & Lincoln Railway & Light Company by the Nebraska State Railway Commission, P. U. R. 1912-C, p. 244, as follows:

> "It is common practice for cities of Nebraska, being served by electric railways, to require paving within the rails and for a certain distance outside of the rails at the expense of the transportation company. This requirement has the approval of statute, as well as of ordinances. It dates back to the time when street cars were hauled by horses and, theoretically at least, there was serious damage to paving in consequence. It was continued after the date of electric railway service on the theory that a valuable right within the city had been granted; that the franchise was a thing on which the company earned large returns; and that the city was merely relieving itself of certain expenses in return for the privilege granted to the transportation company. The situation is now quite different. By regulation within Nebraska, no value is given to franchise rights and no electric transportation company is permitted to earn on any such franchise value. These carriers are limited as

to returns and can make no profits except a fair return on a fair value of the property. They are permitted to capitalize the cost of paving, to earn a fair return thereon, and to set aside, out of gross revenues, a sufficient amount for maintenance and ultimately for replacing of pavement. These amounts the public which rides the electric vehicle are required to pay in the rate charged for transportation. Obviously, the paving is of no moment to the rider within the electric car and he enjoys no benefits from it. Yet, under this practice, he is required to pay an expense which otherwise would be borne by the adjacent property owner or by the village itself, an expense for an improvement which is advantageous solely to the adjacent property owner and to those who use the streets in other manner than by riding in the electric transportation car. Under existing conditions this is, in the opinion of the Commission, highly inequitable to those who must travel in the less luxurious manner provided by the electric trolley company. Were it practicable to impose this additional burden caused by the proposed expense upon the citizens of Papillion who ride the interurban cars, it would still be unjust because they would not be the persons benefited. In general, the cost of paving is assessed on the basis of the benefits derived. Paving burdens, imposed by cities upon electric railway companies in effect, are taxes levied upon the riders and not in accordance with the rule under which other paving taxes are levied."

Then the Commission stated:

"Added emphasis is given to the argument by the fact that the properties are not being operated at a reasonable profit."

Then the Commission cited the scant return which that company was receiving.

Your attention is called to the scant return which this company is receiving as shown on Record page 33, which shows it was making less than two per cent on its prop-

erty, using the taxing basis—an unduly low basis—for the value thereof.

Then the Commission stated:

> "The Commission will not, where it has the right to prevent, be a party to the imposition of this burden upon an electric transportation company and indirectly thereby upon those who, perforce, must travel by electric trolley."

The Connecticut Court sustained the Act under the police power and also under the power to amend charters. As seen in our previous discussion of the police power, this Act cannot be sustained under the police power, especially in Arkansas, where the decisions cited prevent the conferring of such power on an improvement district and the property of the company is not subject to local improvement assessments.

This Court sustained the Connecticut Court on the grounds of amending charters, holding that, assuming that the Act imposed additional burdens on street car companies. Those burdens were:

(a) Within proper relation to the object of the original grant to the company, because the Connecticut Legislature could have imposed these burdens on street car companies.

(b) The power was not exercised in sheer oppression and wrong.

(a) Applying the reasoning to the facts at bar: Under the Arkansas decisions heretofore cited, the street car company was not liable and could not be made liable for special assessments to pay for this improvement, as in Arkansas such property is held to be personal property, and not subject to such assessments under the Constitution; and the company could not be an abutting property owner; and neither a privilege tax, nor any other kind of tax, could have been levied in the improvement district to construct the improvement, except a tax upon the real estate.

Hence it was not within the competency of the State Legislature in the first instance to have imposed these burdens upon the company, and therefore the reasoning applied by this Court in sustaining the Connecticut decision can not be invoked here.

If it be conceded for the sake of the argument that it was competent for the State in a general Act, like the one in Iowa, discussed in Sioux City Street R. R. Co. vs. Sioux City, 138 U. S., 98, where a general statute imposing such burden on all street car companies was sustained as an amendment of charters, in the exercise of the taxing power, yet such an Act in Arkansas could not be sustained after the Legislature had invited the street car companies to surrender their franchises which contained such contractual burdens as these, and in effect said to them that they would only be subject to regulation under the police power, which power does not include the right to impose such burdens.

If it be conceded, for the sake of argument, that such right could have been sustained, applying alike to all companies in the State, as the Act in Connecticut, which was sustained under the police power; or the Act in Iowa, sustained under the taxing power; certainly it could not be sustained as against one company singled out among eight operating street cars in the state, and against one out of two classified as operating under Indeterminate Permits, which tenure was attempted to be made a class of itself.

(b) This Act was one of "sheer oppression and wrong," and solely for the benefit of abutting property owners. This improvement district was formed and the benefits to the abutting property estimated and assessments constituting a lien upon the abutting property were levied to pay for the entire improvement, including that sought by this Act to be imposed on the street car company, before this Act was ever introduced in the Legislature.

Necessarily, the only result of it would be a payment pro tanto of the lien which was resting upon the abutting property before the Act was introduced.

The abutting property owners had subjected their property to the payment of this entire improvement before any action was taken to charge part of the burden on the street car company, and this was done knowingly after they had had the costs estimated and formed the improvement district to pay for the entire costs of the entire pavement. Now they are seeking to have the street car company pay for a part which they had already agreed to pay for before they took measures to cast part of their burden on the street car company, and which the Court has sustained as an amendment of the company's charter.

At the time the Act was drafted and passed the public was using the pavement constructed by this company ten years prior thereto, at a cost of $50,000.00, as the only useable part of the paved street. This was due to the fact that this company had constructed a good pavement ten years prior thereto and the improvement district and the city had constructed a poor pavement which materially injured the paving done by the street car company.

It was this poor job done by the improvement district and the city which necessitated the repaving of the street ten years prior to the time when it should have been repaved. The blunder of the improvement district, which was a public agency of the abutting property owners, caused this work to be done over at this time, and this improvement district was not an agent of this company; it was only an agent of the owners of the real estate within the district, and the principals are now seeking to charge a part of the cost of the blunder of their agent to this company.

The evidence of the plaintiff's own witnesses showed the paving done by this company was in better condition when it was torn up than the average brick pavement in the city, and that the city has about fifty miles of brick paved streets, and yet the best paving of the fifty miles is torn up and relaid at the expense of the street car company.

This company has over twenty miles of track in this

city. The evidence does not show how much of it is on the fifty miles of brick pavement, but inferentially in the evidence it appears that much of it is, and this Act would lay the burden of repaving between the tracks on all or most of the twenty miles of the company tracks, which are on brick paved streets.

The company is making less than two per cent on its investment, and when these other streets are repaved it would place an unbearable burden on the riders of the street cars, for which they would receive no benefit whatever, and if the company could not collect it off the riders in the form of increased fares, it would mean bankruptcy for it.

The manifest purpose of this Act, which was introduced by a Representative from Fort Smith and carried through the Senate by the Senator from Fort Smith, was to shift part of the paving expense in this district, then a fixed lien against the abutting property, to that of the street car company to the extent sued for herein. In doing so the bill for the Act was framed to apply to companies operating under Indeterminate Permits—there then being two such companies.

This was in violation of the Act of 1921 providing that companies retaining their Indeterminate Permits should be regulated only "in the same manner and to the same extent and with like force and effect as in the case of other and like utilities." (Appendix H.)

Miller county, in which was situated the only other company operating under an Indeterminate Permit, was stricken from it, which left it a local bill subject to "tickle-me-tickle-you" method of passing local bills, known as "senatorial courtesy," or "legislative courtesy," and through such method passed both Houses.

A statement of these undisputed facts is submitted to demonstrate that this bill was one passed in "sheer oppression and wrong" and was an arbitrary act of the Legislature and as such offended against the provisions

of the Federal Constitution which were invoked to defeat the imposition sought to be enforced.

Respectfully submitted,

JOSEPH M. HILL,
HENRY L. FITZHUGH,
R. M. CAMPBELL,
Attorneys for Plaintiff in Error.

Appendix A:
Crawford & Moses' Digest,
Section 7492. Exclusive Privileges.

For the purpose of providing water, gas, electric light, heat, cold storage or street railroad, the mayor and council may contract with any person or company to construct and operate such utilities, and may grant to such person or company, for a time which may be agreed upon, the exclusive privilege of using the streets and alleys of such city for such purposes and may authorize such person or company to assign such contract or privileges and to transfer such utility to any other person or company having authority to conduct any such business in the city, with full authority to the assignee or transferee to enjoy and use the same in like manner and to the same extent as the assignor could have done; and all such assignments and transfers which have heretofore been made, are hereby ratified and approved.—Act March 19, 1915, p. 692.

Appendix B:
Crawford & Moses' Digest,
Section 7565. Lighting and Power—Street Railroads.

They shall have power to provide for or construct or acquire works for lighting the streets, alleys, parks and other public places by gas, electricity, or otherwise, or to furnish power to consumers, or to purchase such power, gas or electricity for such purposes from any individual, company or corporation manufacturing the same, and in connection therewith to furnish lights and power to private consumers upon just compensation therefor; and to authorize the construction of gas or electric works and of street railroads.—Act May 6, 1909, p. 695.

Appendix C:
Section 5445 of Kirby's Digest.

The city council of any city or town in this State is hereby authorized when complaint is filed with them by five or more citizens of such city or town that any water company, gas or electric light plant, is charging an ex-

orbitant rate for the supply of water, gas or electricity to summons all such persons together with their books and make such examination as will be necessary to determine whether or not the prices charged for water, gas or electricity, is reasonable; and if, upon examination, the city council shall determine that the citizens or any number of the citizens of such city or town is being charged an unreasonable price for water, gas or electricity, it shall be their duty to fix such prices to be paid for water, gas or electricity, as they may deem to be a reasonable charge.

Appendix D:

Sec. 13 of Act 571 of 1919. Certificate of Convenience and Necessity.

No public service corporation, person, municipality or improvement district, shall begin construction of any plant or utility of any character, which is not in substitution of any existing plant or utility or in extension thereof or in addition thereto within the corporate limits in which it operates, without first having obtained from the Commission a certificate that public convenience and necessity require such construction. No public service corporation shall exercise any right or privileges in any place or territory under any license, franchise, contract, permit or privilege heretofore granted but not heretofore actually exercised, or the exercise of which shall have been suspended for more than one year, without first having obtained from the Commission a certificate that public convenience and necessity require the exercise of such license, franchise, contract, privilege or permit. Before such certificate shall be issued a certified copy of the charter of such corporation shall be filed in the office of the Commission together with a verified statement of its officers showing that it has received the required consent of the proper authorities. The Commission shall have the power to grant the permission and approval herein specified whenever it shall after due hearing, determine that such construction of such exercise of the right, privilege or franchise is necessary, or convenient for the public service. The Commission may, by its order, im-

pose such conditions as it may deem reasonable and necessary. Unless exercised within a period of two years from the grant thereof authority conferred by such certificate of convenience and necessity issued by the Commission shall be null and void.

Every license, permit, contract or franchise hereafter granted to any public service corporation by the State or any municipality and all future contracts, ordinances, rules, regulations and orders entered into or made by any municipality relating to the use or enjoyment of rights and franchise granted to any public utility shall be subject to the exercise, by the Corporation Commission, of any and all of the powers of regulation provided for in this Act.

Appendix E:
Section 14 of Act 571 of 1919,

Grants Hereafter To Be Indeterminate. Every license permit or franchise hereafter granted to any public utility shall have the effect of an indeterminate permit subject to the provisions of this Act and shall not be limited in time but shall continue in force until such time as the municipality shall exercise its right to purchase, in accordance with the provisions of this Act, or until it shall be otherwise terminated according to law.

Appendix F:
Act 571 of 1919,

Section 15. Surrender of Franchise; Indeterminate Permit; Contracts. Any public utility operating under an existing license, permit or franchise, shall upon filing at any time prior to the expiration of such license, permit or franchise, and prior to the first day of January, 1925, with the clerk of the municipality which granted such franchise and with the Commission, a written declaration legally executed, that it surrenders such license, permit or franchise, receive by operation of law in lieu thereof an indeterminate permit as provided in this Act and such public utility shall hold such permit under all the terms, conditions and limitations of this Act. The filing of such

declaration shall be deemed a waiver by such public utility of the right to insist upon the fulfillment of any contract theretofore entered relating to any rate, charge, or service regulated by this Act, and thereupon the public utility shall receive a certificate under the hands and seal of the Commission that such public utility is on and after a day to be therein specified, the holder of such indeterminate permit, which certificate shall be presumptive evidence of the facts therein stated.

Appendix G:
Section 16, of Act 571 of 1919.

Puchase of Plants by Municipalities; Implied, Consent and Waiver. Any public utility accepting or operating under any license, permit or franchise hereafter granted shall, by acceptance of any such indeterminate permit, be deemed to have consented to a future purchase of its property actually used and useful for the convenience of the public by the municipality in which the major part of it is situate, upon notice of not less than one year, from the municipality of its intention to make such purchase, for the just compensation and the damage, if any, and under the terms and conditions of purchase and sale determined by the Commission in the maner hereinafter provided.

Appendix H:

Section 15 of Act 124 of 1921. That all persons, firms, companies or corporations which have surrendered contracts, franchises or leases and are now operating under indeterminate permits granted by the Arkansas Corporation Commission, may within ninety (90) days after the passage of this Act make in writing, signed by official or officials shown to be duly authorized, application to the Municipal Council or City Commission of the municipality in which granted the original franchise, contract or lease, for the reinstatement of said franchise, contract or lease, and when said application is made and filed with Clerk or Recorder of said Municipality, it shall be granted as a matter of right, and said franchise, contract or lease

shall be thereupon reinstated by the Municipal Council or City Commission having jurisdiction, under the same conditions as existed at the time said indeterminate permit was granted by the Arkansas Corporation Commission, and unless the application for reinstatement of said franchise, contract or lease is made within said time and in the manner herein provided, it shall be deemed a waiver on the part of any firm, persons, companies or corporations operating any public service utility, to insist upon the fulfillment of said franchise, contract or lease in any court of law or equity; and all persons, firms, companies or corporations above referred to in this Section electing not to reinstate its franchise, contract or lease under the terms of this Section, and all such persons, firms, companies or corporations holding or being entitled to operate under any other indeterminate permit, heretofore issued by the Arkansas Corporation Commission, shall be permitted to continue to operate under the same terms or conditions specified in said indeterminate permit, but subject however to regulation in the same manner and to the same extent and with like force and effect as in the case of other and like utilities.